

GAO

Report to the Chairman, Committee on
Government Reform, House of
Representatives

July 2004

HOMELAND SECURITY

Transformation Strategy Needed to Address Challenges Facing the Federal Protective Service



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Highlights of [GAO-04-537](#), a report to the Chairman, Committee on Government Reform, House of Representatives

Why GAO Did This Study

With responsibility for protecting thousands of federal facilities, the Federal Protective Service (FPS), which transferred from the General Services Administration (GSA) to the Department of Homeland Security (DHS) in March 2003, plays a critical role in the federal government's defense against the threat of terrorism and other criminal activity. GAO was asked to determine what challenges, if any, FPS faces now that it has been transferred from GSA to DHS.

What GAO Recommends

We are recommending that DHS (1) direct FPS to develop a transformation strategy that addresses its significant challenges; (2) initiate a dialogue with GSA to resolve disagreement over billing issues; (3) take immediate steps to ensure that funds collected from agency rents and fees are used in the future solely for facility protection; and (4) ensure that DHS is prepared to integrate FPS mission-support functions before these functions are transferred, even if the target date has to be extended. DHS concurred with recommendations 1, 3, and 4. DHS and GSA continue to disagree on whether FPS has the authority to bill agencies for its services. As such, we added recommendation 2 after receiving comments from DHS and GSA to encourage a resolution of this disagreement.

www.gao.gov/cgi-bin/getrpt?GAO-04-537.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Mark L. Goldstein at (202) 512-2834 or goldsteinm@gao.gov.

HOMELAND SECURITY

Transformation Strategy Needed to Address Challenges Facing the Federal Protective Service

What GAO Found

FPS faces a number of significant challenges now that it has been transferred from GSA to DHS. These relate to its expanding mission and increased responsibility, unresolved issues about how it will be funded in the future, and the transfer of FPS mission-support functions to DHS.

- Expanding mission and increased responsibility.* FPS has responsibility for securing approximately 8,800 GSA government-occupied facilities and as a result of the transfer, plans to take on additional DHS facilities. FPS might also seek authority to protect other federal facilities. FPS's mission has also expanded to include other homeland security functions, such as support for efforts to apprehend foreign nationals suspected of illegal activity. In light of these changes, however, FPS does not have a transformation strategy to address its expanding mission, as well as the other challenges it is facing.
- Unresolved issues related to funding.* As part of GSA, FPS was funded from security fees that were included with tenant agencies' rent payments. It has not been decided if FPS will begin billing agencies. DHS believes that FPS lacks the authority to bill agencies for facility protection, but GSA disagrees with DHS. Also, GSA has historically covered a shortfall between the cost of security and security fees collected. In commenting on this report, DHS and GSA said that for fiscal year 2005 the President's budget includes an increase in the FPS security rate that, if enacted, will eliminate the shortfall. Related to funding, we also found that FPS's involvement in homeland security activities not directly related to facility protection is inconsistent with a requirement in the Homeland Security Act of 2002 that FPS funding from agency rents and fees be used solely for the protection of government buildings and grounds.
- Transfer of mission-support functions to DHS.* FPS still relies on GSA for mission-support functions, such as travel services, payroll, and contracting support. DHS plans to assume these functions by the end of fiscal year 2004. However, assuming these functions prematurely could affect FPS's ability to accomplish its mission. For example, FPS relies heavily on contract guards and is dependent on GSA's contracting management software to write contracts, track costs, and make vendor payments.

The Federal Protective Service Protects Thousands of Federal Facilities



Sources: FPS and Ernst & Young LLP.

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Abbreviations

DHS	U.S. Department of Homeland Security
GSA	U.S. General Services Administration
FPS	Federal Protective Service
BTS	Border and Transportation Security
ICE	Immigration and Customs Enforcement
PBS	Public Building Service
INS	Immigration and Naturalization Service
FAMS	Federal Air Marshal Service
NIH	National Institutes of Health
OMB	Office of Management and Budget

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United States Government Accountability Office
Washington, D.C. 20548

July 14, 2004

The Honorable Tom Davis
Chairman
Committee on Government Reform
House of Representatives

Dear Mr. Chairman:

Attention to the physical security of federal facilities has increased since the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City. The September 11, 2001, terrorist attacks further heightened this concern and led to the consolidation of 22 agencies into the Department of Homeland Security (DHS). This report responds to your request for information on the transfer of the Federal Protective Service (FPS) from the General Services Administration (GSA) to DHS, where FPS is now part of the Border and Transportation Security Directorate's (BTS) component known as Immigration and Customs Enforcement (ICE). In creating DHS, the government's efforts to prevent, protect against, and respond to potential terrorism were centralized. The establishment of a new federal department is an enormous undertaking that, in the case of DHS, comes with significant risk, which is why we designated the implementation and transformation of DHS as a high-risk area in January 2003. In addition, we also designated federal real property as a high-risk area affecting several agencies, due in part to the major challenge of protecting federal real property from terrorism.

Our objective was to determine what challenges, if any, FPS faces now that it has been transferred from GSA to DHS. To do this work, we collected and analyzed agency documents about the transfer. This included policies and procedures, information about the organizational structure, and information on other issues related to the transfer, such as funding. We assessed the reliability of the data we used and found that they were sufficiently reliable for the purposes of this report. We also interviewed DHS, FPS, and GSA officials responsible for, and directly affected by, the transfer. More information on our scope and methodology appears in appendix I. We conducted our work in Washington, D.C., between September 2003 and May 2004 in accordance with generally accepted government auditing standards.

Results in Brief

FPS faces a number of significant challenges now that it has been transferred from GSA to DHS. These relate to its expanding mission and increased responsibility, unresolved issues about how it will be funded in the future, and the transfer of FPS mission-support functions to DHS.

- FPS has responsibility for securing approximately 8,800 GSA owned or occupied federal facilities and plans to take on responsibility for, according to FPS, approximately 2,500 additional DHS facilities. FPS officials also discussed the possibility of expanding FPS's responsibilities to include protection for facilities where GSA had previously delegated authority to tenant agencies—FPS identified 20 agencies with delegated authority, including the Departments of Defense, Interior, and State. DHS has also expanded FPS's mission to include other functions related to homeland security, such as providing backup to other DHS law enforcement units in the field in efforts to apprehend foreign nationals suspected of illegal activity and assisting with crowd control at major protests. Despite these changes and the major transformation FPS is facing, FPS does not have an overall strategy for how it will carry out its expanding mission, as well as meet other challenges it faces. For this reason, we are recommending that FPS develop such a strategy for its own transformation. In commenting on this report, DHS concurred with our recommendation to develop a transformation strategy for FPS. DHS said that it was developing a strategic plan for FPS that would address our recommendation. Although this plan was not issued when we finalized this report, it is important to note that a transformation strategy goes beyond what is typically contained in a strategic plan. Specifically, a transformation strategy would include overall goals for the transformation with specific action plans and milestones that would allow FPS to track critical phases and essential activities.
- In addition to these formidable mission-related challenges, there are unresolved issues related to funding FPS's operations. When FPS was part of GSA, tenant agencies' rental payments included security fees that GSA used to fund FPS operations. Now that FPS is part of DHS, determining the appropriate funding approach for FPS has centered on whether GSA will continue to bill agencies for FPS's services, which DHS supports, or whether FPS should take on this function, as GSA would prefer. Comments from DHS and GSA showed continued disagreement on this issue. As such, we have added a recommendation to DHS aimed at resolving the disagreement. Also, GSA has historically

covered a gap that has existed between the cost of protection provided by FPS and the security fees collected from tenant agencies—GSA said that this gap was \$139 million in fiscal year 2003. In commenting on this report, DHS and GSA also noted that, for fiscal year 2005, the President’s budget includes an increase in the FPS security rate that, if enacted, will eliminate the shortfall between FPS collections and the cost of security. Also related to funding, we found that FPS’s involvement in homeland security activities not directly related to facility protection is inconsistent with a requirement in the Homeland Security Act of 2002 that FPS funding from agency rents and fees be used solely for the protection of government buildings and grounds. DHS said that FPS’s involvement in activities not directly related to facility protection did not affect its primary mission. However, this is still a concern because of the specific legal requirement that agency rents and fees be used solely for facility protection. We are recommending that the Secretary of Homeland Security take immediate steps to ensure that funds collected from agency rents and fees are used in the future solely for the protection of government buildings and grounds. DHS concurred with this recommendation but had concerns about our interpretation of the statute, which are discussed in more detail in the report.

- Another challenge facing FPS is its reliance on GSA for mission-support functions such as payroll, travel reimbursement, and contracting support. DHS and GSA did not meet an original goal to transfer these functions by the end of fiscal year 2003. According to DHS, FPS, and GSA officials, the delay was caused by issues related to how DHS systems would be integrated, DHS’s focus on integrating larger departmental components, and difficulties extracting FPS activities from GSA systems. DHS officials said that they intend to have FPS fully integrated by the end of fiscal year 2004. However, assuming these functions prematurely could affect FPS’s ability to accomplish its mission. For example, FPS relies heavily on contract guard services, but according to DHS officials, is dependent on GSA’s contracting management software for tracking costs and managing vendor payments. As such, we are recommending that the Secretary of Homeland Security ensure that DHS is prepared to effectively integrate FPS mission support before these functions are transferred from GSA. DHS concurred with this recommendation.

Background

FPS was established in 1971 as the uniformed protection force of GSA government-occupied facilities. FPS has authority, among other things, to

enforce laws and regulations aimed at protecting federal property and persons on such property, and to conduct investigations on, federal property.¹ FPS was originally located within GSA's Public Building Service (PBS). As part of PBS, FPS was responsible for providing law enforcement and security services to GSA's tenants and the public at about 8,800 federal buildings nationwide. As of September 30, 2003, FPS data show that FPS had approximately 1,100 uniformed officer full-time equivalents (FTE)² and 13,000 contract guards to protect GSA-owned or -occupied facilities. In addition, these data showed that FPS had 353 management and mission-support FTE. In addition to managing security at GSA-held facilities, FPS officers also provide other security services such as developing risk assessments, installing security equipment, and conducting criminal investigations.

In response to the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, FPS began enhancing its strategy for protecting federal facilities and making additional security improvements at GSA facilities. FPS officials said that FPS also began relying more on the use of contract guards to provide security and law enforcement protection at its facilities. FPS currently employs approximately 13,000 contract guards. The level of physical protection services FPS provides at each building varies. In some cases, FPS has delegated the protection of facilities to tenant agencies, which may have uniformed officers of their own or may contract separately for guard services.

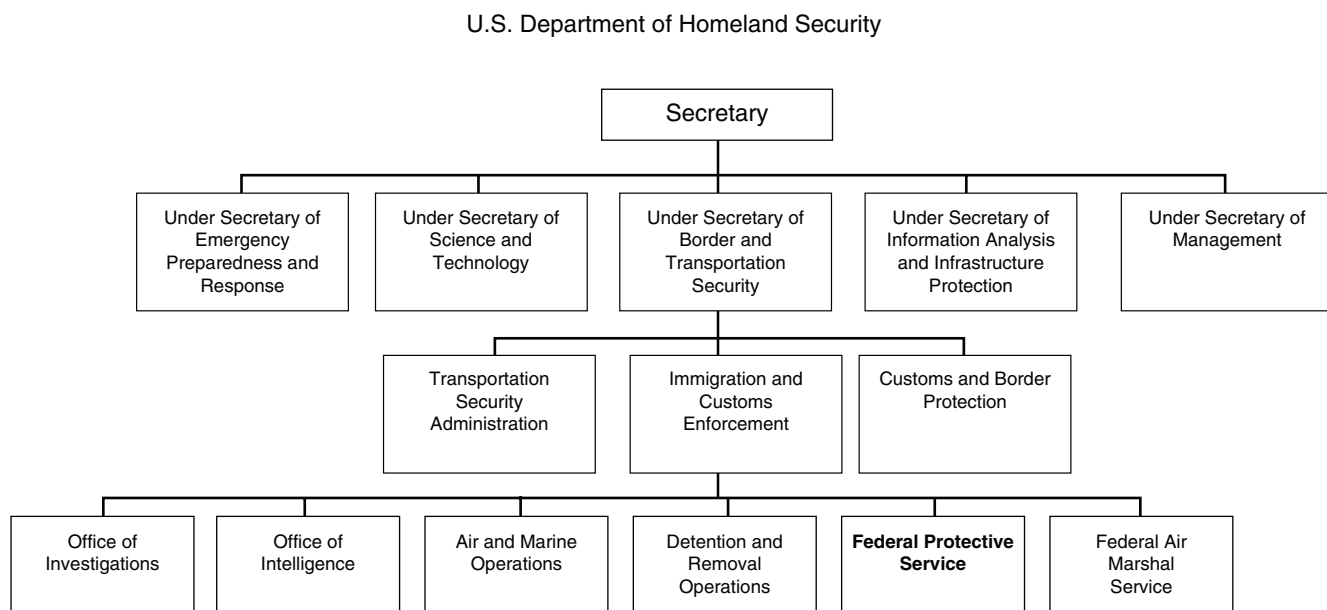
The September 11 terrorist attacks resulted in a renewed emphasis on protecting federal facilities and the nation against terrorist activities. The attacks prompted Congress to pass the Homeland Security Act, which created the Department of Homeland Security (DHS). The new department's mission, among other things, is to prevent terrorist attacks within the United States, reduce the vulnerability of the United States to terrorism, and minimize the damage and assist in the recovery from attacks that do occur. The act combined 22 federal agencies specializing in various disciplines, such as law enforcement, border security, biological research, computer security, and disaster mitigation. As a result of the creation of

¹40 U.S.C.A. § 1315.

²Civilian employment in the executive branch is measured on the basis of full-time equivalents (FTE). One FTE is equal to one work year or 2,080 nonovertime hours. For example, one full-time employee counts as one FTE, and two half-time employees also count as one FTE.

DHS, FPS was moved from GSA to the new department, effective March 1, 2003. Within DHS, FPS became part of the Border and Transportation Security Directorate's (BTS) component known as Immigration and Customs Enforcement (ICE). BTS is tasked with securing the nation's borders and safeguarding its transportation infrastructure. ICE is the investigative and law enforcement arm of BTS and is composed primarily of the investigative components that were formerly part of the U.S. Customs Service (Customs) and the Immigration and Naturalization Service (INS). ICE also includes FPS, the Federal Air Marshal Service (FAMS), and a number of other offices. Figure 1 shows FPS's location within DHS's organizational structure.

Figure 1: FPS's Location within DHS's Organizational Structure



Source: FPS.

The transfer of FPS is only one of a number of organizational transfers and related changes that DHS is managing. While DHS faces the challenge of protecting the nation from terrorism, it is also tasked with combining a disparate group of agencies with multiple missions and unique cultures. Recognizing that the establishment of a new department is an enormous undertaking, GAO designated the implementation and transformation of

DHS as high-risk in January 2003. This designation is based on three factors: (1) the size and complexity of the undertaking, (2) the merging agencies have an array of existing management challenges, and (3) failure by DHS has potentially serious consequences.³ In January 2003, GAO also designated federal real property as a high-risk area in part because of the major challenges agencies face in protecting federal real property from terrorism.⁴

Expanding Responsibilities Pose a Challenge for FPS

Under the Homeland Security Act, DHS became responsible for protecting buildings, grounds, and property owned, occupied, or secured by the federal government that are under GSA's jurisdiction.⁵ In addition to GSA facilities, the act also provides FPS with the authority to protect the buildings, grounds, and property of other agencies whose functions were transferred to DHS.⁶ This effectively meant that FPS, which was merged into DHS, would continue its role as the security and protection force for GSA real property assets as well as DHS properties not held by GSA, and would be performing this function as part of DHS.⁷ A March 2003 operational memorandum of agreement between GSA and DHS made FPS responsible for the same types of security services for GSA facilities that FPS provided before the move to DHS. These include performing risk assessments, managing the installation of security equipment, and conducting criminal investigations. With regard to non-GSA properties, this amounts to approximately 2,500 properties that were held by DHS components and were not part of the GSA real property inventory, according to the FPS chief of staff. This official said that in fiscal year 2005, FPS would collect information, determine the risk categories, and identify existing law enforcement and protective measures at each DHS facility.

³U.S. General Accounting Office, *High-Risk Series: An Update*, [GAO-03-119](#) (Washington, D.C.: January 2003).

⁴See [GAO-03-119](#) and U.S. General Accounting Office, *High-Risk Series: Federal Real Property*, [GAO-03-122](#) (Washington, D.C.: January 2003).

⁵40 U.S.C.A. § 1315 and 6 U.S.C.A. § 203.

⁶40 U.S.C.A. § 1315.

⁷In technical comments on this report, the U.S. Secret Service said that FPS plans to take on responsibility for protecting DHS facilities not otherwise protected by the U.S. Secret Service in connection with its protective responsibilities under 18 U.S.C. § 3056, or otherwise under the control of the U.S. Secret Service.

FPS plans to use this information to develop a strategy that lays out how FPS can take over responsibility for security at the 2,500 additional DHS properties. FPS's chief of staff told us that it might take a number of years before FPS fully assumes control of security at these facilities.

The Director of FPS said that eventually FPS might seek to expand its responsibilities to include protection for facilities where GSA had previously delegated authority to tenant agencies, as well as other facilities where agencies have protective forces with missions similar to that of FPS. The Director of FPS stressed that expanding FPS's authority further is a long-term vision and that FPS is still examining the feasibility of different options. FPS provided information identifying 20 agencies where GSA had previously delegated some of its authority for facility protection or contract guard services. This included various facilities occupied by the Departments of Defense, Agriculture, Commerce, Health and Human Services, Interior, Justice, Labor, State, and Transportation. The Director of FPS said that, in addition, a number of agencies have their own security forces and that it does not make sense for the federal government to have multiple security forces, all charged with facility protection. An example FPS provided was the National Institutes of Health (NIH), which has a small police force charged with protecting NIH's Bethesda, Maryland, campus. FPS officials added that the Homeland Security Act, in their view, provides FPS with the authority for extending FPS's protection responsibilities because it provides the Secretary of Homeland Security with broad authority in implementing actions deemed necessary to protect against terrorism.⁸ In commenting on a draft of this report, DHS said that we took the comments of the Director out of context. DHS also had concerns with our summary and synthesis of the relevant statutory requirements FPS has that are related to FPS's responsibility for protecting federal buildings, grounds, and property. DHS's comments and our evaluation of them are discussed in more detail in the agency comments section of this report.

FPS Has New Law Enforcement Authority and Assists with Other DHS Activities

In addition to increased responsibility in terms of the number of buildings under its control, the Homeland Security Act gave FPS new law enforcement authority for use in carrying out its facility protection mission. This new law enforcement authority empowers officers and special agents

⁸6 U.S.C.A. § 111.

to take action off of federal property to protect the property and the public.⁹ It also allows officers to enter into agreements with state and local law enforcement personnel to carry out activities that promote homeland security. Previously, FPS officers were not authorized to enforce laws off of federal property and, for example, would have to contact local law enforcement personnel to handle illegal activity on the street in front of federal buildings, if it were to occur. FPS officials said that the new authority would better allow them to protect facilities and become more involved in intergovernmental activities aimed at promoting homeland security, such as biological and chemical weapons response training (see fig. 2).

⁹40 U.S.C.A. § 1315.

Figure 2: FPS Officers Engaged in Biological and Chemical Weapons Response Training



Source: FPS.

DHS has also broadened FPS's responsibilities to include assisting with homeland security activities that are not directly related to facility

protection. For example, FPS officials said that FPS officers have provided backup for other DHS law enforcement officers in immigration-related work, such as “Operation Predator,” a program aimed at arresting foreign nationals involved in child pornography. In addition, FPS officials said that FPS officers assisted with various DHS activities—such as crowd control at the free trade protests in Miami, Florida, and protection for major national events such as the Olympics. At the time of our review, FPS’s Web site also listed other activities, including support for security at the Kentucky Derby, which did not relate directly to federal facility protection. We also noted instances where the press reported on FPS participation in other activities, such as involvement in sobriety checks and safety patrols in San Francisco, California. FPS officials said that participation in these activities was intended to enhance FPS’s integration into DHS and that FPS’s participation in these types of activities will likely continue. FPS’s involvement in these activities, and, more specifically, issues related to how they are funded, will be discussed in more detail later in this report and in appendix IV. Figure 3 shows FPS officers assisting with crowd control at a protest.

Figure 3: FPS Officers Assisting with Crowd Control



Source: FPS.

FPS's expanding mission and increased responsibility represent a formidable change for the agency. Transferring to a new federal department is a significant undertaking for any organization. Yet FPS—like several other DHS components—is transferring to DHS while simultaneously focusing on new issues that reflect fundamental changes since September 11 in how the government approaches homeland security issues. In our report designating the establishment of DHS as a high-risk area, we

emphasized that the magnitude of the responsibilities, combined with the challenge and complexity of the transformation, underscores the perseverance and dedication that will be required of all DHS's leaders, employees, and stakeholders in order to achieve success.¹⁰ The Director of FPS agreed with our assessment that the mission-related changes FPS is facing represent a formidable challenge. However, our work showed that FPS does not have a strategy for how it will carry out its expanding mission and increased responsibility, as well as meet the other challenges it is facing. FPS's need for such a transformation strategy, as well as its belief that it is embracing these changes as an opportunity for a positive transformation, are discussed in more detail later in this report.

Issues Related to How FPS is Funded

Maintaining a means of funding FPS that will ensure the adequate protection of federal facilities and allow FPS to meet new homeland security responsibilities is another challenge. When it was part of GSA, FPS was funded through security fees that were included with the rent payments GSA received from tenant agencies. In March 2003, just after FPS's transfer, GSA and DHS agreed that for fiscal year 2004, GSA would continue to collect security fees on behalf of FPS and transfer these funds to DHS. DHS's fiscal year 2004 appropriations act identifies about \$424 million to be transferred from the revenue and collections in the federal buildings fund¹¹ to DHS for FPS operations. According to FPS officials, the security fees GSA collects are intended to cover security standards designated for each building. These standards cover perimeter, entry, and

¹⁰GAO-03-119.

¹¹Established by Congress in 1972 and administered by GSA, the federal buildings fund is a revolving fund in the U.S. Treasury into which federal agency rent and certain other moneys are deposited. Moneys deposited into the fund are available, subject to congressional appropriation, for GSA's real property management and related activities.

interior security and security planning matters.¹² Under this process, GSA would bill agencies for security services on a prorated, square-foot basis, depending on the amount of space each agency occupied.¹³ In addition to these security services, FPS also provides agencies with additional services, upon request, under its reimbursable program. For example, agencies may request additional magnetometers or more advanced perimeter surveillance capabilities. For fiscal year 2004, FPS's reimbursable program will provide an estimated \$337 million in funding for these requests, according to FPS's chief of staff.

The President's fiscal year 2005 budget, released in February 2004, proposes that security fee collections be credited to the FPS account in the Department of the Treasury and identifies \$478 million in funding for FPS. GSA and FPS officials said that for fiscal year 2005, an approach is under consideration whereby GSA would send tenant agencies separate bills for security and rent. Instead of collecting security fees with agency rental payments, tenant agencies would send the security fees directly to the FPS account at Treasury. Under this approach, these officials said that these funds would not pass through the federal buildings fund. In addition, estimates in the President's 2005 budget for the reimbursable program remained at \$337 million, unchanged from fiscal year 2004. In its written response to several funding questions we posed to FPS officials, DHS said

¹²The Department of Justice's June 1995 report, *Vulnerability Assessment of Federal Facilities*, designated security levels I through V into which federal buildings were classified. Fifty-two minimum standards were established, with level I having 18 minimum standards and level V having 39 minimum standards. Examples of minimum standards include lighting with emergency power backup for all buildings (perimeter security), intrusion detection systems for building levels III through V (entry security), visitor control systems for building levels II through V (interior security), and standard armed and unarmed guard qualifications/training requirements in all buildings (security planning). FPS uses periodic risk assessments to validate the current security standards and countermeasures in place at each facility as well as determine additional security enhancements based on identified threats.

¹³GSA security fees consisted of two separate components: basic and building-specific service fees. Basic security fees cover security services provided by FPS to all GSA tenants and include such services as patrol and response, security surveys, alarm monitoring, salaries, and other common cost items. This fee is included in each rent bill on a cost-per-square-foot basis. Building-specific security fees are for security measures specific to a particular building based on its designated security level. For example, a level IV building may have more guards, magnetometers, and cameras than a level I building. Building-specific fees are also charged to GSA tenants based on the square feet they occupy in the building. In technical comments on this report, the U.S. Secret Service pointed out that some agencies occupying commercial space do not receive services from FPS, but are required to pay for FPS benefits at a basic charge per square foot.

that FPS was exploring potential future funding strategies that would better support the expanded mission and revised law enforcement responsibilities associated with the transfer to DHS. Although no decisions have been made regarding how FPS will be funded in the future, DHS, FPS, and GSA officials indicated that discussions to date have centered on whether GSA would continue its practice of billing agencies for security services or whether this should be done by FPS. In DHS's written response on funding issues, DHS took the position that billing individual agencies for the security services FPS provides for GSA buildings was GSA's responsibility.

Specifically,

- DHS said that the billing process and equitable distribution of security costs among the occupants of federal buildings is inherently a real estate function. As such, distributing security costs is similar to distributing utility costs, operation and maintenance costs of major building mechanical systems, and other shared costs. For federal buildings in GSA's inventory, DHS said that this responsibility is specifically reserved for GSA.
- DHS said that the Homeland Security Act made it clear that GSA would continue to be responsible for all real estate-related functions, such as collecting rents and fees, including fees collected for protective services.¹⁴
- DHS said that the transfer of FPS to DHS makes it clear that the primary mission of FPS is to protect buildings and grounds owned or occupied by the federal government and the persons on the property.¹⁵ According to DHS, FPS does not have the mission or authority to establish a separate, duplicative billing and collection process, similar to the one presently established and operated in support of the GSA real estate mission.

DHS added that one possible approach would entail FPS providing GSA with the estimated total costs for its basic law enforcement and protective services. Under this approach, which amounts to FPS billing GSA in one

¹⁴U.S.C.A. § 232.

¹⁵Pub.L. 107-296, Section 1706(b)(1).

lump sum for its services, GSA would then determine the best method for distributing these costs equitably among the tenant agencies. FPS would also provide separate cost estimates for the additional costs that are associated with specific buildings, and GSA would determine the appropriate distribution of these costs among the tenants occupying the building. GSA officials we interviewed had a markedly different view from that of DHS on whether GSA or FPS should bill agencies for security services in the future. According to the Deputy Commissioner of the Public Buildings Service and a GSA budget official, GSA does not want to be involved in billing agencies for FPS security services. These officials said that GSA feels very strongly about this because GSA no longer has control over setting security rates and the level of security required at each building.

In addition, in commenting on a draft of this report, GSA provided a legal analysis that disagreed with DHS's position that FPS lacks authority to bill agencies for security services. GSA said that it considers incorrect any implication that GSA is responsible for billing and collecting fees owed to DHS for FPS-furnished services and that FPS does not have the authority to bill for such services. GSA's complete legal analysis is included in appendix III. GSA continued that as a matter of government efficiency, and in the interest of avoiding unnecessary duplicative systems, GSA could agree to continue to use its systems to produce and distribute a bill on behalf of FPS. GSA added that while it is authorized to provide its billing services to FPS on a reimbursable basis, this does not mean that DHS's billing responsibilities for FPS-provided services belong to GSA. We did not determine whether DHS or GSA was correct in its legal analysis of issues related to billing. However, because of the differing views of DHS and GSA, it would be useful for DHS and GSA to engage in further dialogue so that agreement can be reached. It would be appropriate, in our view, for DHS to initiate these discussions, since FPS is now part of DHS. If, after further discussion, DHS and GSA still disagree on issues related to authority for billing, it would be worthwhile to seek resolution from the Office of Management and Budget (OMB) or the Treasury.

Although issues related to authority for billing agencies were unresolved, we had the following observations related to various options: having GSA continue to bill for security fees makes FPS dependent on GSA to implement a funding mechanism for its operations; in addition to limiting FPS's control over this process, this could also make it unclear which agency is accountable to tenant agencies and other stakeholders. On the other hand, much work would likely be needed for FPS to develop the

expertise, information, and systems for interfacing with GSA and tenant agencies if FPS were to take over the billing function. For example, on the basis of our discussions with GSA and FPS officials, FPS would need to cover the costs of, and develop a method for, collecting up-to-date data on buildings in the GSA inventory and agency space assignments. FPS would also need a financial management function for billing and collections, or DHS would have to integrate such a process into its financial management systems.

Regarding DHS's suggestion that a possible approach might entail FPS providing a total estimated cost to GSA, it would be critical for FPS to develop and provide reliable data and GSA would need assurance that FPS was doing so. Providing reliable data would be a challenge for FPS because, as will be discussed in more detail later, DHS faces challenges related to integrating its component agencies' mission support systems and producing reliable management information. Nonetheless, DHS emphasized in its discussion on funding issues that FPS is working to establish the appropriate level of law enforcement and protective services required and is developing a plan for phasing these requirements and their related costs into subsequent budget years. DHS said that this process would utilize historical costs, workload, benchmarks, and best practices collected from federal, state, and local agencies that perform similar functions.

As FPS moves forward, accurately identifying costs would also be important because of shortfalls GSA has experienced between collections and the cost of providing security. According to FPS's director of financial management and a GSA budget official familiar with FPS funding issues, the security fees GSA charges tenant agencies historically have not been sufficient to cover FPS operations. To address the past shortfalls, GSA has covered the additional costs with other funds from the federal buildings fund. For example, according to a GSA budget official, security fees in fiscal year 2003 generated about \$139 million less than it cost to fund the basic services that FPS provides to tenant agencies. According to these GSA and FPS officials, the shortfalls have been caused over the years by increasing security costs and restrictions on tenant agencies' rental payments that were enacted in legislation. In commenting on this report, DHS and GSA also noted that for fiscal year 2005 the President's budget includes an increase in the FPS security rate that, if enacted, will eliminate the shortfall between FPS collections and the cost of security. Nonetheless, even if this increase helps close the gap between the cost of security and tenant payments, the accurate identification of costs still represents a

challenge that may need to be addressed if the mechanism for funding FPS were restructured.

Funding for Some FPS Activities Not Directly Related to Facility Protection

DHS has broadened FPS's responsibilities to include assisting with homeland security activities that are not directly related to building protection. FPS officials said that these activities have primarily included providing backup to other DHS law enforcement units in the field and that DHS has the authority under the Homeland Security Act to engage FPS in activities DHS deems necessary to enhance homeland security. However, engaging FPS in these activities under its current funding structure is inconsistent with a provision of the act that provides that funds transferred by GSA to DHS from rents and fees collected by GSA are to be used solely for the protection of federal buildings and grounds.¹⁶ FPS officials said that GSA-transferred funds have been FPS's only source of funding for the security services it provides and that the reimbursable funds it receives from agencies are tied to specific agency requirements. It is our position that DHS's use of FPS staff time and other resources for activities that are not directly related to the protection of federal buildings and grounds is inconsistent with the act, which limits the use of agency funds from rents and fees to the protection of buildings and grounds owned or occupied by the federal government.

In November 2003, we requested that DHS provide information on the extent of FPS's involvement in activities not related to building protection, the legal basis for any such activities, and the reasons these activities would be permissible in light of the act's prohibition on the use of funds transferred from GSA to DHS. In a written response from DHS's Under Secretary for Border and Transportation Security, DHS stated that it did not keep detailed records of these activities. DHS said that FPS's involvement in these activities was minor, or *de minimus*, and that FPS only performed an assist role. DHS added that the support FPS provided did not affect the accomplishment of FPS's mission and that its participation in operations away from federal facilities was minimal. DHS indicated in its response that these activities were permissible because they had no impact on FPS operations and because no special equipment was procured for these activities.

¹⁶6 U.S.C.A. § 232.

We understand that FPS's involvement in these activities was, in DHS's view, minor and may not have had a direct effect on facility protection. We also understand, as DHS pointed out, that FPS's involvement in such activities can strengthen interoperability and bonding between FPS and other DHS law enforcement units. However, the funding of FPS's involvement in these activities is a concern because of the specific statutory language contained in the Homeland Security Act related to the use of funds collected from agency rents and fees. At a minimum, if DHS plans to continue and perhaps increase FPS's involvement in these activities, having a means of reimbursing FPS, or funding these activities separately, would be consistent with the requirement that funds from agency rents and fees intended for facility protection are used for that purpose. Also, funding these activities separately would make it necessary for DHS to track them and develop a way to account for their costs. Having such a process would, as a result, allow for greater accountability with regard to the deployment of FPS resources. In its written response to questions we had during our review on funding issues, DHS said that FPS has an established process for recouping expenses of a reimbursable nature. DHS acknowledged that this process could also be used—within DHS—to recoup the cost of non-facility-protection-related activities currently being performed by FPS.

In commenting on this report, DHS again expressed its view that such activities would not have to be reimbursed if they are of limited duration with local offices, ad hoc, and do not increase the direct costs of FPS operations and investment in staff. DHS said it proposes to issue guidance to this effect. We continue to disagree with DHS on this issue and believe that the proposed guidance would not be appropriate. The agency comments section of this report and appendix IV contain a complete discussion of our position.

Successfully Transferring FPS Mission-Support Functions to DHS Will Be Challenging

In addition to challenges associated with expanding responsibilities and establishing a funding mechanism, FPS still was relying on GSA for many of its mission-support functions. As part of GSA, FPS was not self-sufficient with respect to mission-support functions, including payroll, travel services, and contracting. These functions were performed for FPS by mission-support staff located in other GSA organizational units. For example, its contracting functions—which are integral to FPS's mission because of FPS's extensive use of contract guards—were handled by the contracting component of GSA's Public Buildings Service. Furthermore, FPS employees used GSA's centralized, integrated administrative system,

known as FedDesk, to perform many day-to-day functions such as time and attendance and travel requests and reimbursement. According to FPS officials, FPS's reliance on staff and systems outside of its organization was different from other, larger agencies that moved to DHS and had internal mission-support functions and systems that were transferred to DHS with the organizations.

Recognizing that FPS faced a challenge, DHS and GSA signed a mission-support memorandum of agreement in February 2003 so that GSA could continue to support FPS after the transfer. Under this agreement, GSA would provide FPS with reimbursable mission support for human resources, payroll, information technology, and some contracting functions until these functions were transferred to DHS. FPS officials said that funds used to reimburse GSA for these services were to come out of agency rents and fees originally transferred from GSA. DHS and GSA set a goal of the end of fiscal year 2003 for this transfer. However, GSA and DHS were unable to meet this goal and opted to extend the agreement until the end of fiscal year 2004. According to DHS, GSA, and FPS officials that we interviewed, the transfer of mission support did not occur for the following reasons:

- DHS was still in the process of determining which mission support systems it would adopt from agencies and organizations that had transferred into DHS and how the various systems would be integrated;
- DHS management was focusing its efforts on the transfer of larger agencies, such as INS and Customs, and DHS believed that since FPS was being supported by GSA, DHS could focus on agencies that were larger and were a greater priority; and
- FPS activities were deeply integrated into GSA's mission-support systems. For example, FPS's e-mail, telecommunications, travel, time and attendance, and human resource systems are all part of GSA's FedDesk system, and extracting them individually for use by DHS would be difficult.

DHS officials said that they intend to have FPS mission support fully integrated before the end of fiscal year 2004. Specifically, at the time of our review, DHS intended to transfer FPS's information technology support by June 2004 and the remaining administrative systems—human resources, travel, payroll, and contracting support—by September 2004. We did not assess the effect that FPS's reliance on GSA for mission support had on

FPS's effectiveness in protecting facilities. In commenting on this report's discussion of contracting, DHS stated that the contracting function does not pose a challenge because it has already transferred from GSA to DHS. According to DHS, FPS has a senior contracting specialist at headquarters who oversees policies and standards for the contract guard program. DHS added that 24 contracting officers are currently managing FPS contracts throughout FPS's 11 regions. Nonetheless, we still believe that the contracting area poses a challenge because of FPS's continued reliance on GSA to support this function. More specifically, although FPS has contracting staff on line, GSA and FPS officials told us that FPS has continued to use GSA's contracting management software to write contracts, track costs, and make vendor payments. Contracting support, at the time of our review, had not been integrated into DHS's systems. The January 2004 mission-support memorandum of agreement between GSA and DHS specifies that FPS will pay GSA about \$544,000 for these services for fiscal year 2004. Because contracting support is critical to FPS's ability to accomplish its mission due to its reliance on contract guards, a smooth transfer of these functions will be imperative.

During our review, we also found other difficulties that FPS had encountered related to mission support. FPS officials said that their lack of in-house mission support resulted in instances where law enforcement officers had to assume administrative duties. For example, according to these officials, law enforcement personnel played a large role in resolving problems FPS was having in October 2003 with government purchase cards that were issued by DHS. These cards, FPS officials explained, were not compatible with GSA's financial systems because the DHS cards were from a different financial institution. FPS officials acknowledged that having law enforcement officers perform these types of functions could divert resources from protecting facilities and participating in other homeland security activities. Furthermore, these officials said that there has been confusion about whether FPS should adhere to GSA or DHS administrative policies and procedures, as well as where they should go for assistance or to get approval for administrative issues. For example, a senior FPS official said that in October 2003, 7 months after the transfer, DHS and GSA had not resolved which agency would approve restored annual leave for officers who were required to be on duty because of emergencies. In commenting on this report, GSA said that the January 2004 memorandum of agreement between GSA and DHS had resolved many of the issues related to administrative policies and procedures. Also, DHS said in its comments that related to travel, ICE has implemented an electronic travel system to move to a more efficient travel authorization and vouchering process.

Clearly, FPS faces a major challenge integrating its mission-support activities with DHS. In fact, FPS's situation is symptomatic of the broader mission support and information system challenges DHS is facing as a new federal department. In our January 2003 Performance and Accountability Series report on DHS, we reported that DHS faces considerable challenges in integrating the many systems and processes that provide management with decision information.¹⁷ We encouraged DHS to identify its needs in order to build effective systems that can support the national homeland security strategy in the future. Furthermore, DHS would be faced with the challenge of integrating the contracting functions of its many constituent programs and missions, some of which have had past deficiencies. For example, in May 2002, we reported that for its import processing system, Customs lacked important acquisition management controls.¹⁸ In July 2003, we reported that INS did not have the basic infrastructure—including oversight, information, and an acquisition workforce—in place to ensure that its contracting activity is effective.¹⁹ Customs and INS concurred with our findings and agreed to take action. These concerns about contracting issues have implications for FPS given that it relies heavily on contracting, through its contract guard program, to accomplish its mission. Overall, given the concerns about DHS's ability to integrate FPS mission-support activities, FPS's ability to accomplish its mission could be affected if these functions were to be transferred prematurely. Therefore, it is important for DHS to ensure that it can effectively integrate these functions before they are transferred from GSA, even if it is necessary to extend the September 2004 target date.

¹⁷U.S. General Accounting Office, *Major Management Challenges and Program Risks: Department of Homeland Security*, [GAO-03-102](#) (Washington, D.C.: January 2003).

¹⁸U.S. General Accounting Office, *Customs Service Modernization: Management Improvements Needed on High-Risk Automated Commercial Environment Project*, [GAO-02-545](#) (Washington, D.C.: May 13, 2002).

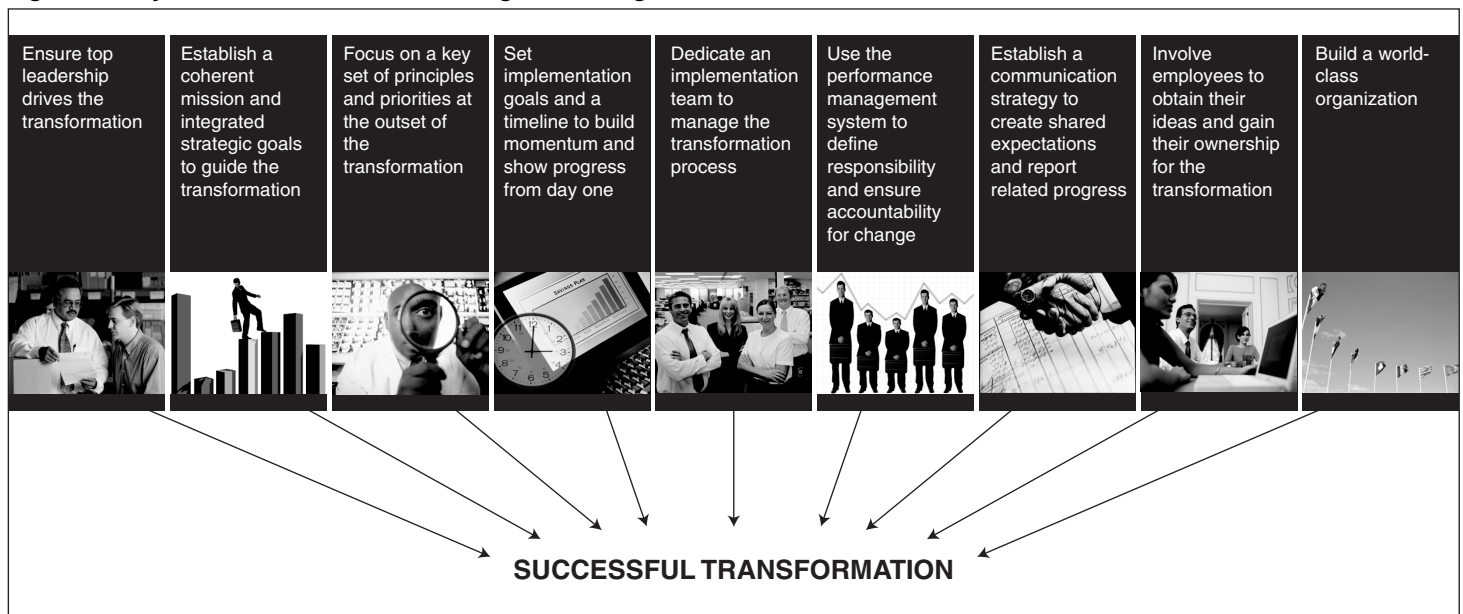
¹⁹U.S. General Accounting Office, *Contract Management: INS Contracting Weaknesses Need Attention from the Department of Homeland Security*, [GAO-03-799](#) (Washington, D.C.: July 25, 2003).

Considering Key Practices Could Help FPS Address Challenges and Achieve a Successful Transformation

Despite the challenges it faces, FPS's transfer to DHS presents an opportunity for a positive transformation. According to FPS officials, the transfer has given FPS the opportunity to reevaluate its mission and assess whether it is sufficiently organized and equipped to meet its new and broader roles. FPS's top management team has embraced the new role in homeland security and is eager to become fully integrated with a law enforcement agency. These officials added that they have begun to rethink FPS's approaches and priorities so that FPS can better protect federal facilities, the employees who occupy them, and the visiting public. Fully implementing the transfer into DHS and completing the type of transformation FPS envisions will be critical to FPS's long-term viability and success. Yet, given the challenges we identified, carrying out this transformation will be no easy task. To better ensure a successful transformation, FPS and its stakeholders could benefit from considering the experiences of other organizations that have undergone successful mergers and transformations. GAO's July 2003 report on implementation steps to assist mergers and transformations identified key practices followed by public and private sector organizations that have led to success.²⁰ These key practices are shown in figure 4 and are briefly described below. A more comprehensive discussion of these practices and related implementation steps can be found in our July 2003 report.

²⁰U.S. General Accounting Office, *Results-Oriented Cultures: Implementation Steps to Assist Mergers and Organizational Transformations*, [GAO-03-669](#) (Washington, D.C.: July 2, 2003).

Figure 4: Key Practices for Successful Mergers and Organizational Transformations



Sources: GAO (presentation); Photos: Photo Disc, Dynamic Graphics, EyeWire, and Ingram Publishing.

- *Ensure top leadership drives the transformation*—Because a merger or transformation entails fundamental and often-radical change, strong and inspirational leadership is indispensable. Top leadership must set the direction, pace, and tone and provide a clear, consistent rationale that brings everyone together behind a single mission.
- *Establish a coherent mission and integrated strategic goals to guide the transformation*—The mission and strategic goals of a transformed organization must become the focus of the transformation, define the culture, and serve as the vehicle for employees to unite and rally around. Mission clarity is especially essential to define the purpose of the transition to employees, customers, and stakeholders. The strategic goals must align with and support the mission and serve as continuing guideposts for agency decision making.
- *Focus on a key set of principles and priorities at the outset of the transformation*—A clear set of principles and priorities serves as a framework to help the organization create a new culture and drive employee behaviors. Focusing on these principles and priorities helps

the organization focus on performing mission-related activities while maintaining its drive toward achieving the goals of the transformation.

- *Set implementation goals and a timeline to build momentum and show progress*—A merger or transformation is a substantial commitment that could take years to complete and therefore must be carefully monitored. As a result, it is essential to establish long-term action-oriented implementation goals and a timeline with milestones to track the organization’s progress toward its short- and long-term transformation goals.
- *Dedicate an implementation team to manage the transformation process*—Dedicating a strong and stable implementation or integration team that will be responsible for the transformation’s day-to-day management is important to ensuring that the transformation receives the focused, full-time attention needed to be sustained and successful. Specifically, the implementation team is important to ensuring that various change initiatives are sequenced and implemented in a coherent and integrated way. Top leadership must give the team the necessary authority and resources to set priorities, make timely decisions, and move quickly to implement top leadership’s decisions regarding the transformation.
- *Use a performance management system to define responsibility and ensure accountability for change*—An organization’s performance management system is a vital tool for aligning the organization with desired results and showing how team, unit, and individual performance contribute to overall organizational results. Performance management systems can help manage and direct the transformation process. These systems are the basis for setting employee’s expectations in the transformation process and evaluating individual contributions to the success of the transformation process and organizational results.
- *Establish a communication strategy to create shared expectations and report related progress*—Creating an effective internal and external communication strategy is essential to implementing a merger or transformation. Communication is most effective when it occurs early and often and when it is downward, upward, and lateral. Organizations have found that communicating information early and often helps to build trust among employees and stakeholders, as well as an understanding of the purpose of planned changes. Organizations must develop a comprehensive communication strategy that reaches out to

employees, customers, and stakeholders and seeks to engage them in the transformation process.

- *Involve employees to obtain their ideas and gain their ownership for the transformation*—A successful merger and transformation must involve employees and their representatives from the beginning to gain their ownership of the changes that are occurring in the organization. Employee involvement strengthens the transformation process by including frontline perspectives and experiences. Further, employee involvement helps to create the opportunity to establish new networks, increase employees' understanding and acceptance of organizational goals and objectives, and gain ownership of new policies and procedures.
- *Build a world-class organization*—Successful organizations continually seek to implement best practices in processes and systems in areas such as information technology, financial management, acquisition management, and human capital.

We did not do an in-depth analysis comparing these practices with FPS's transformation efforts. Nonetheless, FPS officials, including its Director, agreed that it would be useful for FPS to consider following these practices. FPS provided examples where it believed its efforts reflected these practices. These related to areas such as FPS's heavy involvement on departmentwide teams dedicated to integrating DHS's components, participating in the development of a strategic plan for DHS, and improving its core competencies in, for example, law enforcement training, so that it is better prepared to fulfill its expanding mission and responsibilities. However, we noted other critical areas reflected in the key practices where greater attention could, in our view, enhance FPS's chances of making a successful transformation. For example, although FPS has provided input to DHS's strategic plan,²¹ which was released in February 2004, FPS has not developed a transformation strategy of its own that reflects key practices. Such a strategy could contain implementation goals, measures, and a timeline that FPS could use to show progress toward its transformation. In addition to containing goals and measures related to progress with its transformation, FPS could use such a plan as a platform for demonstrating its effectiveness with its mission to protect federal facilities and

²¹U.S. Department of Homeland Security, *Securing our Homeland: U.S. Department of Homeland Security Strategic Plan* (Washington, D.C.: February 2004).

performance in other homeland security activities. It could also demonstrate how FPS's transformation links with the broader goals and objectives that are contained in DHS's strategic plan that relate to facility protection and FPS's other homeland security activities. To be more effective, it could also be linked to DHS's ongoing integration efforts. Incorporating key practices into FPS's ongoing transformation efforts could be particularly helpful given the significant challenges FPS is facing. These challenges—FPS's expanding mission and increased responsibility, unresolved issues related to funding, and the transfer of mission support from GSA to DHS—will complicate FPS's transformation efforts until they are addressed or, at a minimum, factored into FPS's transformation planning efforts.

In commenting on a draft of this report, DHS said that in March 2004 FPS began developing its own strategic plan, which DHS said would support the overall goals and objectives of the DHS strategic plan and would be consistent with GAO's key practices for organizational mergers and transformations. At the time this report was finalized, FPS's strategic plan had not been issued. However, it is important to note that a transformation strategy would contain information beyond what would be found in a typical strategic plan. The agency comments section of this report further discusses transformation strategies and what they contain.

Our past work has discussed adopting similar practices for DHS. Recognizing that the establishment of a new department is an enormous undertaking, we designated the implementation and transformation of DHS as high-risk in our January 2003 Performance and Accountability and High Risk series.²² We reported that in addition to the high risk associated with developing a new department from a multitude of agencies, DHS is confronted with a number of existing major management challenges from the functions and organizations being transferred to it. We encouraged DHS to implement some of the key practices to assist mergers and organizational transformations discussed earlier, including clearly defining the mission and goals of the new department, devoting sustained efforts to transition planning, and involving employees in the transformation process.

We also recommended adopting similar practices at DHS components such as the U.S. Coast Guard and FAMS. In our work looking at the transition of the Coast Guard to DHS, we reported that the Coast Guard was

²²GAO-03-119.

experiencing numerous implementation challenges as it transitioned to DHS.²³ These challenges include developing a new strategic plan that reflects the Coast Guard's wide variety of missions, establishing effective communication links and partnerships within DHS and with external organizations, and establishing performance management systems that incorporate the Coast Guard's new homeland security mission. We suggested that the Coast Guard could also benefit from implementing the key practices for mergers and transformations. Lastly, we reported that FAMS is facing challenges in implementing changes resulting from its merger into DHS, including issues related to roles and responsibilities, training, and coordination with external organizations such as Transportation Security Administration.²⁴ We recommended the implementation of some of the key practices to help FAMS with such changes. DHS, FAMS, and the Coast Guard concurred with our recommendations. For example, in commenting on the recommendations for FAMS, DHS said that it welcomed our proposals for using key practices that would ultimately maximize FAMS's ability to protect the American people, contribute to the protection of the nation's critical infrastructure, and preserve the viability of the aviation industry.

Conclusions

With its critical role in protecting federal real property against the threat of terrorism and other criminal activity, it is imperative that FPS's transfer to DHS and its related transformation are successful. However, in addition to the inherent challenges any organization would face in becoming part of a new federal department, FPS brings a set of unique challenges that have great bearing on its ability to accomplish its mission. Given the significance of the challenges it is facing—an expanding mission and increased responsibility; unresolved issues related to funding, including past shortfalls that were covered by GSA; and various mission-support issues—FPS could benefit from a transformation strategy that effectively makes the case for what type of organization it believes it should become and provides a road map for getting there. Consideration of key practices that

²³U.S. General Accounting Office, *Homeland Security: Challenges Facing the Coast Guard as it Transitions to the New Department*, [GAO-03-467T](#) (Washington, D.C.: Feb. 12, 2003).

²⁴U.S. General Accounting Office, *Aviation Security: Federal Air Marshal Service Is Addressing Challenges of Its Expanding Mission and Workforce, but Additional Actions Needed*, [GAO-04-242](#) (Washington, D.C.: Nov. 19, 2003).

others have focused on to successfully transform their organizations could be an important part of such a strategy.

Related to funding, it would be appropriate for DHS to initiate a dialogue with GSA aimed at resolving the disagreement concerning FPS's authority to bill agencies for security services. Regarding FPS's involvement in homeland security activities not related to facility protection, such involvement is a concern because of the requirement in the Homeland Security Act that agency rents and fees be used solely for the protection of federal buildings and grounds. At a minimum, if DHS plans to continue and perhaps increase FPS's involvement in these activities, having a means of reimbursing FPS, or funding these activities separately, would be consistent with the requirement that funds from agency rents and fees intended for facility protection are used for that purpose. Also, funding these activities separately would make it necessary for DHS to track them and develop a way to account for their costs. Finally, ensuring a seamless transfer of mission-support functions from GSA to DHS is critical. Given the concerns about DHS's ability to integrate FPS mission-support activities, prematurely transferring these functions to DHS could negatively affect FPS's ability to carry out its mission responsibilities.

Recommendations for Executive Action

We are making four recommendations to the Secretary of Homeland Security. First, we recommend that the Secretary direct the Director of FPS—in consultation with the Under Secretary for Border and Transportation Security and the Assistant Secretary for Immigration and Customs Enforcement—to develop and implement a transformation strategy that reflects FPS's consideration of key practices and addresses the significant challenges it is facing. In particular, this strategy should identify implementation goals, measures, and a timeline that FPS could use to show progress toward its transformation and demonstrate that it is accomplishing its mission while undergoing changes. It should also link FPS's goals and measures to the broader goals and objectives contained in DHS's strategic plan and to DHS's ongoing integration efforts. In serving as a road map for FPS's transformation, such a strategy should be used by FPS as a platform to identify strategies and proposals for addressing the significant challenges that we identified—expanding mission and increased responsibility, unresolved issues related to funding, and mission-support challenges related to the eventual transfer of these functions from GSA to DHS. Second, we recommend that the Secretary initiate a dialogue with GSA aimed at resolving disagreement between DHS and GSA about whether FPS has the authority to bill GSA's tenant agencies for security

services. If this issue cannot be resolved, DHS should seek resolution from OMB or the Treasury. Third, we recommend that the Secretary take immediate steps to ensure that funds collected from agency rents and fees are used in the future solely for the protection of buildings and grounds owned or occupied by the federal government. If FPS continues its involvement in activities not directly related to facility protection, a funding process would be needed that is consistent with the requirement regarding the use of funds from agency rents and fees. In addition, a means of tracking these activities and determining related costs would also be needed. Last, we recommend that the Secretary ensure that DHS is prepared to effectively integrate FPS mission-support functions before these functions are transferred from GSA, even if it is necessary to extend the September 2004 goal for the transfer.

Agency Comments and Our Evaluation

We provided a draft of this report to DHS and GSA for their official review and comment. DHS provided its comments in a letter from the Director of Resources, Border and Transportation Security Directorate, on May 3, 2004. These comments can be found in appendix II. As noted in DHS's letter, DHS also provided separate technical comments, which we did not publish but incorporated where appropriate. The U.S. Secret Service also provided some technical comments, which we incorporated where appropriate. GSA provided its comments in a letter from the Deputy Commissioner of the Public Building Service on April 29, 2004. In commenting on this report, GSA also provided a legal analysis regarding the authority to charge and collect FPS security fees. GSA's position was discussed earlier in this report, and its comments and legal analysis can be found in appendix III. GSA and DHS comments on the historical gap between security fees and costs were also discussed earlier in this report.

DHS concurred with our recommendations to develop a transformation strategy, to ensure that agency rents and fees are used solely for facility protection, and to ensure that DHS can effectively integrate FPS mission-support functions before these functions are transferred from GSA. On the basis of the comments we received from DHS and GSA showing their continued disagreement on billing issues, we added the recommendation aimed at resolving this disagreement. As a result, DHS did not comment on this additional recommendation because it was added after the comment period. Although DHS generally agreed with the report's message and concurred with the other recommendations, it took issue with certain aspects of our analysis. DHS's comments on the challenges FPS faces in the contracting area were discussed earlier. In addition, DHS had comments on

several other aspects of the report, which are discussed below. These related to the FPS Director's discussion of delegations of authority for facility protection, the extent of FPS's authority to protect federal facilities, the components of FPS security fees, funding for activities not related to facility protection, and FPS's need for a transformation strategy.

FPS Director's Comments on Delegation of Authority for Facility Protection—DHS said that we took certain comments made by the Director of FPS out of context. DHS was referring to discussions we had with the Director about expanding FPS's authority to include protection of facilities where GSA had previously delegated authority to tenant agencies. DHS said that the Director was referring to efforts by the House Committee on Transportation and Infrastructure, Subcommittee on Economic Development, Public Buildings and Emergency Management, to suspend further delegations of any authority for facility protection to GSA tenant agencies. While the subject of delegation was discussed with the Director, we disagree with DHS's assessment that we took the Director's comments out of context. The discussions dealt specifically with existing delegations and FPS's desire to expand its responsibilities by "getting back" authority for protection where it had previously been delegated by GSA. Furthermore, the Director's comments were not the only instance where the issue of expanding FPS's authority was raised. On four other occasions during our review, top FPS officials, including the chief of staff, made it clear to us that FPS may seek to expand its authority. This was also discussed by an ICE official. And, because these issues dealt with possible future plans, we included the Director's caveat, in the report, that expanding FPS's authority is a long-term vision and that FPS is still examining the feasibility of different options. GSA commented that it had no objections to our interpretation of the Homeland Security Act and agreed that FPS's authority to protect federal property includes properties under the custody and control of GSA, as well as those under the custody and control of DHS. GSA also said that while FPS's law enforcement authority expanded under the Homeland Security Act, it defers to DHS on the extent of FPS's authority to protect other federal properties and personnel.

Extent of FPS's Authority for Facility Protection—DHS commented that our description of its responsibility for protecting buildings, grounds, and property suggests limitations that are not present in the law. In this regard, for example, DHS takes issue with our statement that under the Homeland Security Act DHS is responsible for protecting building, grounds, and property "that are under GSA's jurisdiction." DHS states that "the Homeland

Security Act does not mention property controlled by [GSA].” In making this statement—as well as others cited by DHS—the report summarizes and synthesizes the relevant statutory requirements, rather than quoting them verbatim. Thus, while it is true that the particular provision vesting DHS with protective responsibilities does not mention GSA-controlled property, DHS clearly acquired responsibility for GSA-controlled property under the Homeland Security Act because FPS, which was responsible for protecting federal agencies and previously under GSA’s jurisdiction, was among those agencies whose functions and personnel were transferred to DHS under the Homeland Security Act. Nonetheless, on the basis of DHS’s comments, we have made technical clarifications to our descriptions of the law, where appropriate.

In addition to raising technical issues, DHS makes several statements that, although not entirely clear, could be read as suggesting that DHS might be taking a broader view of its authority relating to the protection of federal buildings and grounds than our analysis of the statute would support. The relevant statutory provision is 40 U.S.C. 1315(a), as amended by section 1706(b)(1) of the Homeland Security Act, which provides that: “To the extent provided for by transfers made pursuant to the Homeland Security Act of 2002, the Secretary of Homeland Security...shall protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government (including any agency, instrumentality, or wholly owned or mixed-ownership corporation thereof) and the persons on the property” [emphasis added]. DHS states that the description of the facilities under DHS control in the latter part of the statute is “all inclusive” and that the “intent of the law is far more inclusive than GSA property and property transferred as part of the establishment of DHS, none of which are instrumentalities nor mixed ownership corporations.” To the extent that DHS is maintaining that its authority extends beyond property under the control and custody of GSA and DHS, we disagree with its interpretation. The statute provides DHS with authority over buildings and property only to “the extent provided by transfers made pursuant to the Homeland Security Act,” and thus DHS authority is limited to properties under the control of GSA (through the transfer of FPS to DHS) and any other agency whose functions were transferred to DHS under the act.

Security Fees—DHS said that it believes that our explanation for how FPS is funded requires clarification because the report did not distinguish between the two components of FPS security fees. According to DHS, FPS was traditionally funded through rent portions devoted to recovering security costs collected by GSA for space occupied by GSA tenants. These

“security fees” consisted of two separate components. The basic security charge covered security services provided by FPS to all GSA tenants and includes such services as patrol and response, security surveys, alarm monitoring, salaries, and other common cost items. This fee was charged to all GSA tenants and was included in each tenant’s rent bill as a part of the rate per square foot. The building-specific security charge is for security measures specific to a particular building based on the designated security level that were specified by the Department of Justice in June 1995 in response to the Oklahoma City bombing. For example, a Level IV building may have more guards, magnetometers, and cameras than a Level I building. The charges for building-specific security services are allocated by GSA to tenants based on the number of square feet they occupy in the building. DHS commented that our draft report did not clarify that security fees for specific agencies vary depending upon the building and its unique security requirements. DHS also noted that FPS uses a reimbursable program to charge for security services that are in excess of what FPS determines is sufficient for a building or could not be deferred for inclusion in the next rent estimate cycle. DHS said that understanding how FPS security fees are charged is important in understanding the issues associated with how FPS security fees should be billed in the future. Finally, DHS added that understanding the elements of the security fee process is essential to understanding why DHS and GSA disagree as to how security fees should be billed in the future. On the basis of DHS’s comments, we clarified the information in the report related to the different components of security fees.

Funding for Activities Not Related to Facility Protection—Although DHS concurred with our recommendation to ensure that funds collected from agency rents and fees are used solely for facility protection, DHS again expressed its view that such activities would not have to be reimbursed if they are of limited duration with local offices, ad hoc, and do not increase the direct costs of FPS operations and investment in staff. DHS said it proposes to issue guidance to this effect. DHS cited Comptroller General legal decisions as a rationale for this position. DHS also said that some activities that do not appear to relate to facility protection actually do because of the proximity of nearby federal buildings. For example, DHS said that FPS’s involvement in the free trade protests in Miami was critical to protecting the facilities of agencies that were the focal point of the demonstration. We recognize that there may be situations, such as the Miami protests, where FPS may engage in activities that are necessary or incidental to protecting federal buildings. Furthermore, DHS said that FPS headquarters reviews and approves all FPS regional special operation plans

and expenditures to ensure the appropriate use of funds. DHS also stated that in response to our report, ICE would develop guidance for determining when it is reasonable for FPS to provide security services that are not directly related to the protection of federal buildings and grounds.

We do not believe that the development of such guidance would be appropriate. The language in section 422(b)(2) of the Homeland Security Act of 2002 explicitly restricts the use of funds collected by GSA from its tenants out of rents and fees “solely” for the protection of government buildings and grounds.²⁵ Because of this limitation in the statute, the use of these funds for any purpose other than the protection of government buildings and grounds would not be permitted absent reimbursement pursuant to other applicable statutory authority. DHS refers to two GAO decisions as supporting its proposal to issue guidance approving the use of funds for unrelated purposes if such activities “are of limited duration with local offices, ad hoc, and do not increase the direct costs of FPS operations and investment in staff.”²⁶ We do not agree that these two decisions support guidance sanctioning the *de minimis* use of FPS funds for explicitly prohibited purposes. The two decisions, in allowing nonreimbursable details in certain circumstances, adopted guidance in the Federal Personnel Manual, which has been rescinded and is no longer effective. Moreover, to the extent that the two decisions are read by DHS as setting a *de minimis* standard of general applicability, they are not in keeping with the governing law on the *de minimis* concept. The legal concept of *de minimis* typically goes to measure the amount associated with a legal violation, allowing trivial or inconsequential amounts to be overlooked, on a case-by-case basis. The concept has not been applied to, nor would the case law support, the prospective approval of activities across an organization like FPS, knowing that they constitute violations of law.

Accordingly, we would object to DHS establishing guidance for prospective situations that would sanction FPS’s use of funds for *de minimis* expenditures that are not incidental or necessary to the protection of federal buildings and grounds. Our full legal analysis of this issue is contained in appendix IV.

²⁵Public Law 107-296, 116 Stat. 2135, 2184-2185 (2002).

²⁶The two cited decisions are 64 Comp. Gen. 370 (1985) and 65 Comp. Gen. 635 (1986).

The Need For a Transformation Strategy—DHS concurred with our recommendation that FPS develop a transformation strategy because of its expanding mission and responsibilities, as well as the other challenges it is facing. DHS said that in March 2004, FPS began developing its own strategic plan, which DHS said would support the overall goals and objectives of the DHS strategic plan and would be consistent with GAO’s key practices for organizational mergers and transformations. At the time of our review, FPS’s strategic plan had not been issued. Although a strategic plan is an important part of FPS’s transformation, a transformation strategy would contain information beyond what would be found in a typical strategic plan. More specifically, a transformation strategy would provide a connection between long-term strategic goals in its strategic plan and the day-to-day activities of managers and employees engaged in achieving integration of FPS into DHS.²⁷ Such a transformation strategy would include overall goals of the transformation with specific action plans and milestones that would allow it to track transformation and integration goals identifying critical phases and essential activities that need to be completed by and on any given date.²⁸ By demonstrating progress towards reaching these interim goals, FPS can build momentum and demonstrate that real progress is being made toward full integration into DHS.

In developing its transformation strategy, it is important that FPS also consider all the key practices we have identified for effective mergers and transformations. This would include incorporating a communications approach that reaches out to employees, customers, and stakeholders and seeks to genuinely engage them in the transformation process, as well involving them in various aspects of the transformation to help gain ownership of the transformation. For example, in our July 2003 report on mergers and organizational transformations, we stated that according to a JPMorgan Chase managing director, the chief executive officer and merger implementation team publicized and reported progress on specific goals for each phase of its merger to help rally employees and maintain their drive towards reaching full integration. These goals were connected to overall themes and particular milestones, and the JPMorgan Chase chief executive officer reinforced these goals at leadership meetings and

²⁷For example, see U.S. General Accounting Office, *Architect of the Capitol: Management and Accountability Framework Needed for Organizational Transformation*, [GAO-03-231](#) (Washington, D.C.: Jan. 17, 2003).

²⁸[GAO-03-669](#).

employee townhalls and in Web-based messages and other communications.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution of it until 30 days from the date of this report. We will then send copies to other interested congressional committees, the Secretary of Homeland Security, DHS's Under Secretary for Border and Transportation Security, DHS's Assistant Secretary for Immigration and Customs Enforcement, the Administrator of GSA, and the Director of OMB. Copies will also be available to other interested parties on request. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you have any questions regarding this report, please contact me on (202) 512-2834 or at goldsteinm@gao.gov, or David Sausville, Assistant Director, on (202) 512-5403 or at sausvilled@gao.gov. Other contributors to this report were Kelly Blado, Casey Brown, Matt Cail, Anne Izod, and Susan Michal-Smith.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'M. Goldstein', with a long horizontal flourish extending to the right.

Mark L. Goldstein
Director, Physical Infrastructure Issues

Scope and Methodology

To determine what challenges, if any, the Federal Protective Service (FPS) has faced since it was taken out of the General Services Administration (GSA) and transferred to the Department of Homeland Security (DHS), we collected and analyzed agency documents about the transfer. This included policies and procedures, information about the organizational structure, and information on other issues related to the transfer, such as funding. We also interviewed agency officials from DHS, FPS, and GSA headquarters who were responsible for and directly affected by the transfer. After identifying the challenges FPS was experiencing, we collected documents and spoke to DHS and GSA agency officials about each challenge. To better understand FPS's responsibilities and mission, we reviewed relevant laws and documents and interviewed DHS and GSA agency officials. Specifically, we reviewed the laws relating to FPS's authority both before and after the transfer to DHS and analyzed the Homeland Security Act of 2002 to determine if FPS has gained any new legal authority under the act. We also reviewed the operational memorandums of agreement between DHS and GSA (for fiscal years 2003 and 2004) and other information, which we verified, on FPS's new Web site. We met with GSA officials to discuss the types of services FPS provided for GSA before and after its transfer to DHS. We interviewed DHS headquarters officials about the types of security and protection activities FPS has been performing since the transfer and their vision for the agency as part of DHS. Lastly, we spoke with ICE officials to obtain an understanding of how they envision the role of FPS within their organization.

With regard to funding issues, we analyzed agency budget documents and interviewed DHS and GSA budget officials. Specifically, to identify how the agency would be funded in fiscal years 2004 and 2005, we reviewed the Homeland Security Act, the 2004 GSA and DHS appropriations acts, and the President's budget for fiscal year 2005 to determine funding FPS has received and amounts requested. We corroborated funding data with data from FPS and GSA, as well as OMB data provided for a related GAO engagement. Lastly, we spoke with GSA and DHS budget officials about how the agency was funded during the transition (fiscal years 2003 and 2004), how the agency would be funded in the upcoming fiscal year (fiscal year 2005), and any alternate funding proposals for future fiscal years, including fiscal year 2006 and beyond. To better understand FPS mission-support issues, we reviewed the operational and mission-support memorandums of agreement between DHS and GSA (for fiscal years 2003 and 2004) to determine what FPS mission-support systems would transfer to DHS. We interviewed DHS and FPS mission-support officials in charge of

managing all aspects of the transfer, including the transfer of FPS mission-support functions from GSA to DHS.

We considered prior GAO work on major management challenges and program risks of the DHS and challenges facing other DHS components, such as the Immigration and Naturalization Service, the Federal Air Marshal Service, and the U.S. Coast Guard. We considered prior GAO work on key practices used by public and private organizations that have undergone successful mergers and transformations. We did not do an in-depth analysis comparing these practices with FPS's transformation efforts. However, we held discussions with FPS officials to obtain their views on whether they were applicable to FPS.

DHS, FPS, and GSA provided much of the data and other information used in this report. We noted cases where these officials provided testimonial evidence, and we were not always able to obtain documentation that would substantiate the testimonial evidence they provided. In cases where officials provided their views and opinions on various issues within the context that they were speaking for the organization, we corroborated the information with other officials. We assessed the reliability of the funding data by (1) performing limited electronic testing of the data elements; (2) corroborating the data with FPS, GSA, and information obtained from OMB for another GAO review; (3) interviewing knowledgeable agency budget officials; and (4) comparing the data with other published data, such as the fiscal year 2004 GSA and DHS appropriations acts. Overall, we found no discrepancies with these data and therefore determined that they were sufficiently reliable for the purpose of this report.

Comments from the Department of Homeland Security

U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

May 3, 2004

Mark L. Goldstein
Director, Physical Infrastructure Issues
United States General Accounting Office
441 G Street, NW
Washington, D.C. 20548

Dear Mr. Goldstein:

We have reviewed the **GAO Draft Report, Homeland Security: Transformation Strategy Needed to Address Challenges Facing the Federal Protective Service, GAO-04-537, (5430283)**, and generally concur in the overall findings. However, we believe there are instances in the narrative that require clarification. We have discussed these below. Attached please find technical comments intended to improve the accuracy of the report. With respect to the three recommendations, we agree subject to the comments provided and especially invite your attention to our comments on your second recommendation. Our response follows.

Expanding Responsibilities Pose a Challenge for FPS. The report states: "Under the Homeland Security Act, DHS became responsible for protecting buildings, grounds, and property owned, occupied, or secured by the federal government that are under GSA's jurisdiction." *[emphasis added]* The Homeland Security Act does not mention property controlled by the General Service Administration (GSA.) On this issue the report continues with "the Homeland Security Act also provides FPS with the authority to protect buildings, grounds, and property of other agencies whose functions were transferred to DHS." We believe this statement requires correction in that the law contains no such language. Further, this statement implies an explicit limitation on the scope of Department of Homeland Security (DHS) authority for the protection of federal property. While the Section 1315 (a) does begin with the phrase "To the extent provided for by transfers made pursuant to the Homeland Security Act of 2002," there is no limitation as to GSA property. There is also no limitation on non-GSA property that was under the custody and control of those agencies transferred to DHS, as the report implies. We are of the opinion the law is all inclusive based on the language in Section 1315 (a) wherein it states after the words "owned, occupied, or secured by the Federal Government" the following: "including any agency, instrumentality, or wholly owned or mixed-ownership corporation thereof . . ." This clearly reflects the intent of the law that is far more inclusive than GSA property and property transferred as part of the establishment of DHS, none of which are instrumentalities nor mixed ownership corporations.

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The comments on page 8 of the draft report which are attributed to the Director of FPS – “FPS might seek to include protection for facilities where GSA had previously delegated authority to tenant agencies, as well as other facilities where agencies have protective forces with similar missions” – appear to be taken out of context. The comments were intended to simply reflect previous guidance from the House Committee on Transportation and Infrastructure, Subcommittee on Economic Development, Public Buildings and Emergency Management. In two letters to the Administrator of the General Services Administration (GSA) on January 29, 2002, and then again on March 4, 2003, the Committee members expressed their concern about further GSA delegations of FPS related authority to other agencies without analysis by the Committee in advance. Specifically, the March 4, 2003 letter to Administrator Perry from Congressmen LaTourette and Congresswoman Norton stated “Until the DHS establishes a comprehensive national program, and the operating and oversight systems to support this program, we continue to believe that it is in the best interest of not only GSA but also the FPS to suspend activities to delegate any authority to protect public buildings.” The letter also made reference to the January 2002 letter indicating that “we requested that you postpone any delegation of such [law enforcement] authority until such time that the subcommittee has had an opportunity to analyze the impact of such a delegation on the FPS...” It is these statements and subsequent conversations with committee staff that were the genesis for the Director’s comments. The information conveyed was intended to reflect the rethinking of several approaches, such as delegations of law enforcement authority, reconsidered in the post 9/11 environment and in many cases later reflected in the creation of the Department of Homeland Security.

We believe that the interpretation of the language in the Homeland Security Act on protection of federal property should be broad rather than narrow. The report does mention DHS’ position that the mission of the Federal Protective Service (FPS) is to protect buildings and grounds owned or occupied by the Federal Government and the persons on the property. Clearly, as with any Department or agency, if security effectiveness and efficiencies can be realized by exercising existing authorities or pursuing additional authorities, the Department will take appropriate action to achieve those enhancements.

Issues Related to How FPS is Funded: We believe the sections relating to how FPS is funded require clarification, particularly as they relate to charging security fees in the future. Preliminarily, a clear understanding of how GSA funded FPS is necessary. FPS was traditionally funded through those portions of the rents devoted to recovering security costs collected by GSA for space occupied by GSA tenant agencies. Those “security fees” consisted of essentially two separate charges. The first was a charge for the “Basic Services.” This rate was the same for all agencies regardless of space occupied or location. It covered the services provided by FPS to all GSA tenants and included such things as patrol and response, security surveys, alarm monitoring, salaries, and other common cost items. This charge was included in each rent bill as part of the rate per square foot and adjusted annually.

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The second charge was a "Building Specific" charge. This charge reflected FPS' cost recovery of security measures that were specific to a particular building. For example, Level IV security buildings have many more guards, more magnetometers, cameras, etc., than Level I buildings, which include small federal offices in shopping centers. The charges for these Building Specific expenses were allocated by GSA to the tenant agencies based on their pro rata share of the square feet occupied in the respective building. This is especially important in understanding the issues associated with who performs the billing function in the future as discussed below. As a result, security fees for specific agencies varied depending upon the building and its unique security requirements. All tenants share Building Specific expenses. The draft report did not distinguish between these two types of charges.

In addition to these two charges, a third vehicle for payment of security services was the reimbursable program. The reimbursable program funds those expenses incurred by agencies for security services that are either in excess of what FPS determined sufficient, or could not be deferred for inclusion in the next rent estimate cycle. For example, many of the guards that are currently provided are paid for through the reimbursable program.

Understanding these elements of the security fee process is essential to understanding why DHS and GSA disagree as to how security fees should be billed in the future. Additionally DHS and GSA continue to pursue resolution of questions of who has the authority to bill for the provision of FPS services through existing processes. The report identified \$139 million gap in fund collections compared to the provision of FPS services provided in FY 2003. For FY 2005, the President's Budget Request includes a rate adjustment that covers FPS' projected expenses.

Successfully Transferring FPS Mission-Support Functions to DHS Will Be Challenging: We agree that the transfer of mission support functions always presents certain challenges. However, the contracting function does not pose a challenge and was sufficiently accommodated in the transfer. Contracting at FPS has already transitioned to, and is operating under the auspices of, the Immigration and Customs Enforcement (ICE) Procurement Program within DHS, including the review and issuance of DHS Contracting Warrants. The FPS has a senior Contracting Specialist at Headquarters that oversees policies and standards for the contract guard program. Contracts continue to be awarded and administered by 24 FPS Contracting Officers located in the 11 FPS Regions. Additional contracting support is available from the ICE Procurement Program and the Department at large, should the need arise. With respect to concerns raised in the report on travel services, ICE has implemented an electronic travel system to move to a more efficient travel authorization and vouchering process.

Recommendation 1: The Secretary of Homeland Security should direct the Director of FPS - in consultation with the Under Secretary for Border and Transportation Security and the Assistant Secretary for Immigration and Customs Enforcement - to develop and implement a transformation strategy that reflects FPS's consideration of key practices and addresses the significant challenges it is facing. In particular, this strategy should identify implementation

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goals, measures, and a timeline that FPS could use to show progress toward its transformation and demonstrate that it is accomplishing its mission while undergoing changes. It should also link FPS's goals and measures to the broader goals and objectives contained in DHS's strategic plan.

RESPONSE: Concur. As noted in the draft report, DHS issued its strategic plan in February of 2004. The Director of FPS convened a national management conference the week of March 1, 2004, to finalize FPS' draft long-range strategic plan. Consultants from the IBM Corporation, who participated in the development of the DHS Strategic Plan, assisted in that effort and were especially attentive to ensuring FPS alignment with the Department's Strategic Plan. FPS presented its plan to ICE management and it is in the process of being reviewed and vetted through ICE management officials. It is anticipated that the FY 2006 budget request will be based on this plan. The FPS strategic plan will support the overall goals and objectives of the DHS plan and it will be consistent with the key practices discussed in the draft report so as to ensure effective implementation.

Recommendation 2: The Secretary of Homeland Security take immediate steps to ensure that funds collected from agency rents and fees are used solely for the protection of buildings and grounds owned or occupied by the federal government. If FPS continues its involvement in activities not directly related to facility protection, a funding process would be needed that would be consistent with the requirement regarding the use of funds from agency rents and fees.

RESPONSE: Concur. The FPS policies and procedures, established while the FPS was a Program of the GSA, require that the funding transferred from the Administrator of GSA from rents and fees be used to for the protection of buildings or grounds owned or occupied by the Federal Government. Where FPS security services are required but have not been accounted for in the rent or fees collected by the Administrator of GSA, the individual agencies must reimburse the FPS for the cost of the service. The FPS has a program and policies, and extensive experience in processing and managing reimbursable services. The FPS provides additional security services to Federal agencies on a direct reimbursable basis totaling approximately \$300 million annually. The policies and procedures of the FPS require that requests for support or services not related to the protection of Federal buildings and grounds must be accompanied by a reimbursement for those services.

However, we must point out that some of the programs questioned by GAO in the body of the report are directly related to the protection of Federal facilities. The protection of Federal buildings during political demonstrations is a primary duty of the FPS. The FPS response to the Free Trade protests in Miami was critical to protecting the complex of Federal buildings housing the agencies that were the focal point of the demonstrations. Likewise, deploying FPS officers and assets to cities where major political and national events are scheduled focuses primarily on increased protection for Federal buildings and grounds adjacent to or in the vicinity of activities attracting large numbers of participants. All regional special operation plans (major demonstrations and national events) are reviewed and approved at FPS Headquarters. Funding is

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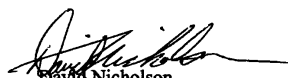
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allocated and expenditures are reviewed by the Headquarters Financial Management staff to ensure the appropriate use of the funds.

ICE will develop guidance for determining when the provision of service is reasonable, customary and de minimis with respect to assistance provided by FPS that are not generally directly related to the protection of Federal building and grounds. We believe that findings of the Comptroller General support the provision of this service provided support to these activities that are of limited duration with local offices, ad hoc and do not increase the direct costs of FPS operations and investment in staff.

Recommendation 3. The Secretary of Homeland Security ensure that DHS is well equipped to assume FPS mission-support functions before these functions are transferred from GSA, even if it is necessary to extend the September 2004 goal for the transfer.

RESPONSE: Concur. FPS shares the concern regarding the transfer of mission support functions from GSA to DHS. FPS procedures governing everything from finance, travel, time and attendance, information technology applications, human resource procedures and processes, and payroll are electronically linked and interdependent via GSA's advanced systems. The transfer of those functions will require new systems, new processes, and new training for FPS employees. It will be a challenging task. FPS and DHS officials are working daily to ensure the transfer is as efficient and as trouble free as possible. We are confident the transfer can be accomplished by the target goal of October 1, 2004. We are equally confident that should DHS determine that reaching that goal might jeopardize FPS' mission, it will negotiate an extension with GSA to do so.


David Nicholson
Director of Resources
Border and Transportation Security
Department of Homeland Security

Enclosure

Comments from the General Services Administration



GSA Public Buildings Service

April 29, 2004

Mark L. Goldstein
Director, Physical Infrastructure Issues
U.S. General Accounting Office
Washington, DC

Dear Mr. Goldstein:

The General Services Administration (GSA) appreciates this opportunity to submit agency comments on the U.S. General Accounting Office (GAO) "Draft Report to the Chairman, Committee on Government Reform, U.S. House of Representatives, *Homeland Security, Transformation Strategy Needed to Address Challenges Facing the Federal Protective Service*," GAO-04-537 (Draft Report). While we know that the Draft Report pertains to the Department of Homeland Security's (DHS) Federal Protective Service (FPS) and that DHS will undoubtedly be submitting its own agency views, GSA felt it necessary to address or clarify certain issues raised in the Draft Report in this separate submission. We address the challenges GAO set out in the beginning of the Draft Report:

Expanding mission and increased responsibility. We have no objections to GAO's findings regarding the expanding mission of the FPS and defer to DHS on its authorities to expand the mission of the FPS. We agree with the Draft Report that under the Department of Homeland Security Act of 2002, as amended, (the Act) the FPS authorities to protect Federal properties include properties under the custody and control of GSA as well as those under the custody and control of DHS. While the enclosed legal memorandum from GSA's Office of General Counsel notes that section 1706 of the Act did expand the law enforcement authorities of the FPS under 40 U.S.C. § 1315, to what extent the FPS has authorities to protect other Federal properties and personnel, we defer to DHS.

Unresolved issues related to funding. The enclosed legal memorandum also addresses most of these issues. However, it does not address the restriction in Section 422(b)(2) of the Act regarding the use of funds transferred by the Administrator to the Secretary of Homeland Security from rents and fees collected by the Administrator. We consider any implication that GSA is responsible for billing and collecting fees owed to DHS for FPS furnished services, and that FPS does not have the authority to bill for their services, to be incorrect. As a matter of government efficiency, and in the interest of not creating unnecessary duplicative systems, GSA could agree to continue to use its

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systems to produce and distribute a bill on behalf of FPS. While GSA is authorized to provide its billing services to FPS on a reimbursable basis, this does not mean that DHS's billing responsibilities for FPS-provided services belong to GSA.

As for Section 422(b)(2), we note that to the extent that FPS is funded through fees collected by the Administrator, those fees must be used to protect Federal buildings and grounds and not for other purposes. This could definitely impact the ability of FPS to take on expanded roles unrelated to the protection of Federal property unless funded through direct appropriations or other DHS sources. As FPS' mission expands, it is important that the rates charged to GSA and the tenants of GSA facilities reflect costs attributable to protecting the GSA-controlled property. Costs associated with the expanded mission, including the costs associated with the increased overhead at the FPS, Bureau, Directorate and DHS headquarters levels, should not be charged to GSA customers.

On pages 16 and 17 of the Draft Report, there is a discussion regarding the historical gap between the cost of security and tenant payments that were directly attributable to security. Although the gap existed in prior years, by FY 2005, based on the President's Budget, the gap has been closed. Beginning in FY 2004, the President's budget allowed for \$28 million to be funded by a direct appropriation to DHS instead of through offsetting collections. Additionally, the FY 2004 President's budget reflected an increase in the security rate that narrowed the shortfall. The FY 2005 President's Budget reflects a security rate that closed the funding gap. Beginning in FY 2005, FPS is allowed to charge a security rate to GSA tenants that should fully fund FPS for services provided to GSA tenants. We take issue with the implication on page 17 that GSA is available to cover FPS shortfalls, and specifically the statement: "Addressing this historical gap between the cost of security and tenant payments represents another challenge that would need to be addressed if the mechanism for funding FPS were restructured, *particularly if GSA were to no longer cover the shortfall with other funds.*" (Draft Report, p. 17, *emphasis added*). The funding gap associated with protecting GSA facilities has been addressed in the FY 2005 President's Budget. GSA has transferred all of the budget authority and funds associated with FPS and GSA has not requested any additional authority associated with the transferred functions. Therefore, if FPS were to expand their mission, it would seem appropriate for DHS to look for either a direct appropriation or other DHS funding sources, and it would not be appropriate, nor do we think legally permissible, to look to GSA to fund any future shortfalls.

Transfer of mission-support functions to DHS. Beginning on page 19, there is a discussion of FPS mission support functions transferred to FPS. In March, 2003, GSA transferred to FPS 21 FTE that were directly related to procurement (contracting) functions and an additional 8 FTE related to the budget functions. GSA is not providing

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the contracting functions as implied in the GAO report – those responsibilities have been transferred to DHS as required by the Act. The only FTE that are temporarily remaining with GSA (per a Memorandum of Agreement between DHS and GSA regarding Support Services for FPS and FedCirc (Support Services MOU)) are 15 FTE providing payroll, accounting, HR, and other services associated with GSA's Working Capital Fund that FPS has asked GSA to provide on a reimbursable basis through FY 2004. Once those functions are transferred to DHS, the 15 FTE will be transferred to DHS. The statement on page 20 of the Draft Report: "After FPS's transfer to DHS, GSA retained the contracting staff responsible for FPS as part of the memorandum of agreement to provide mission support" is incorrect and potentially misleading. All FTE associated with the contracting function were transferred immediately. Furthermore, our Support Services MOU contemplates the continued availability of contracts for security guard services on GSA's Federal Supply Service's Schedules contracts.

Finally, on page 21 of the Draft Report, there is a statement that "there has been confusion about whether FPS should adhere to GSA or DHS administrative policies and procedures, as well as where they should go for assistance or to get approval for administrative issues." Although that statement may have been true in October 2003, as the example illustrated, the GSA/DHS Support Services MOU, signed in January 2004, resolved those issues.

Thanks you for this opportunity to address the issues raised in the Draft Report. Should you have any questions concerning this letter, please contact David Morris on (202) 501-4159.

Sincerely,



Paul Chistolini
Deputy Commissioner
Public Buildings Service

Enclosure: OGC Legal Opinion

GAOauditresponse.doc LR 4/29/04

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Comments from the General Services
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GSA Office of General Counsel

April 22, 2004

MEMORANDUM FOR: PAUL CHISTOLINI
DEPUTY COMMISSIONER
PUBLIC BUILDINGS SERVICE (P)

THRU: SAMUEL J. MORRIS, III 
ASSOCIATE GENERAL COUNSEL
REAL PROPERTY DIVISION (LR)

FROM: HARMON R. EGGERS 
DEPUTY ASSOCIATE GENERAL COUNSEL
REAL PROPERTY DIVISION (LR)

MICHAEL J. WOOTTEN 
SENIOR ASSISTANT GENERAL COUNSEL
REAL PROPERTY DIVISION (LR)

SUBJECT: Authority of the General Services Administration (GSA) and the
Department of Homeland Security (DHS) to Charge and Collect
for Protection, Law Enforcement and Related Security Services

QUESTIONS PRESENTED:

In response to a recent GAO Draft Audit Report,¹ you asked for the Office of General Counsel's opinion on three related questions:

1) Does GSA have authority to charge and collect from other Federal agencies for the law enforcement and related security services provided by DHS's Federal Protective Service (FPS)?

2) Does DHS have the authority to charge other Federal agencies for the law enforcement or related security services provided by FPS?

¹ U.S. General Accounting Office (GAO) Draft Report to the Chairman, Committee on Government Reform, House of Representatives, "Homeland Security, Transformation Strategy Needed to Address Challenges Facing the Federal Protective Service," GAO-04-537.

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3) Under what conditions and authorities could GSA charge and collect from other Federal agencies for such FPS services?

ANSWERS:

As explained below:

1) GSA lacks the independent authority to bill and collect from other Federal agencies for the law enforcement or related security services provided by FPS.

2) Although the Homeland Security Act does not directly address this function, we believe that an argument can be made that DHS has the authority to charge (i.e., bill) and collect from other Federal agencies for the law enforcement or related security services provided by FPS.

3) GSA could agree to provide the billing and collection services on a reimbursable basis to DHS, using DHS's own authority to bill and collect for services provided by FPS. However, if DHS concludes that it lacks such authority, GSA cannot do for DHS that which DHS lacks authority to do for itself.

I. GSA Authority to Charge for Space and Services

GSA's authority to charge for furnishing space and services to federal agencies is set forth in 40 U.S.C. § 586, which provides in pertinent part:

§ 586. Charges for space and services

(a) Definition. In this section, "space and services" means space, services, quarters, maintenance, repair, and other facilities.

(b) Charges by Administrator of General Services.

(1) In general. The Administrator of General Services shall impose a charge for *furnishing space and services*.

(2) Rates. The Administrator shall, from time to time, determine the rates to be charged for furnishing space and services and shall prescribe regulations providing for the rates. The rates shall approximate commercial charges for comparable space and services....

40 U.S.C. § 586 (*emphasis added*). Charges imposed by GSA under 40 U.S.C. § 586(b) for *furnishing* space and services are required by law to be deposited into the Federal Buildings Fund (FBF). 40 U.S.C. § 592(b)(1). Deposits into the FBF are available for GSA's real property management and related activities in the amounts specified in annual appropriation laws without regard to fiscal year limitations. 40 U.S.C. § 592(c)(1).

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In accordance with 40 U.S.C. § 586, GSA is required to charge agencies occupying GSA-controlled space for "space and services" **furnished by GSA**. This provision does not authorize GSA to charge agencies for services furnished to GSA's tenant agencies by agencies other than GSA. Therefore, GSA is not authorized by law to charge agencies for the protection services (including law enforcement and related security services) **furnished by FPS** because 40 U.S.C. § 586 only authorizes GSA to impose charges for services **furnished by GSA**.

GSA disagrees with the interpretation offered by a DHS official that the Homeland Security Act of 2002 (hereinafter, "the Act"), and specifically, section 422 of the Act, 6 U.S.C. § 232, requires that GSA must continue to be responsible for collecting all fees for protection services, regardless of whether the services are furnished by DHS or GSA. As we will explain more fully, the Act clearly transfers from GSA to DHS certain (but not all) GSA authorities for the protection of buildings under the custody and control of GSA. The protection functions transferred were all of the FPS functions, including law enforcement and related security, along with the necessary GSA functions related to FPS. Section 422 of the Act sets forth what was retained by GSA and not transferred to DHS. Section 422 provides as follows:

§ 422. Functions of Administrator of General Services

(a) Operation, maintenance, and protection of Federal buildings and grounds. Nothing in this Act may be construed to affect the functions or authorities of the Administrator of General Services with respect to the operation, maintenance, and protection of buildings and grounds owned or occupied by the Federal Government and under the jurisdiction, custody, or control of the Administrator. *Except for the law enforcement and related security functions transferred under section 403(3)* [6 U.S.C. § 203(3)] the Administrator shall retain all powers, functions, and authorities vested in the Administrator under chapter 10 of title 40, United States Code [40 U.S.C. §§ 501 et seq.], and other provisions of law that are necessary for the operation, maintenance, and protection of such buildings and grounds.

(b) Collection of rents and fees; Federal Buildings Fund.

(1) Statutory construction. Nothing in this Act may be construed--

(A) to direct the transfer of, or affect, the authority of the Administrator of General Services to collect rents and fees, including fees collected for protective services; or

(B) to authorize the Secretary or any other official in the Department to obligate amounts in the Federal Buildings Fund established by section 490(f) of title 40, United States Code [40 U.S.C. § 592].

(2) Use of transferred amounts. Any amounts transferred by the Administrator of General Services to the Secretary out of rents and fees collected by the Administrator shall be used by the Secretary solely for the protection of buildings or grounds owned or occupied by the Federal Government.

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6 U.S.C. § 232 (*emphasis added*). Further, section 403 of the Act, 6 U.S.C. § 203, transferred the FPS of GSA (which handled law enforcement and related security functions of GSA), along with the functions of the Administrator of General Services relating thereto, to DHS. Section 1706 of the Act amended 40 U.S.C. § 1315, expanding the law enforcement authority of FPS, and providing that DHS became responsible for protecting buildings, grounds, and property owned, occupied, or secured by the Federal Government that are under GSA's jurisdiction, in addition to the properties of other agencies transferred to DHS pursuant to the Act.

It is clear from Section 422 of the Act, 6 U.S.C. § 232, that except for the law enforcement and related security functions transferred to DHS by the Act, GSA retains all powers, functions, and authorities vested in the Administrator by law for the operation, maintenance, and protection of GSA-controlled buildings and grounds. GSA is authorized by numerous interrelated provisions of law to operate, maintain, and protect GSA-controlled federal buildings and, at the request of a federal agency, other buildings owned by the Federal Government and occupied by the agency making the request.²

Therefore, the Act created some overlap in the protection authorities of GSA and DHS. Both DHS and GSA have responsibilities for protecting GSA-controlled buildings and grounds. However, as to GSA-controlled buildings, DHS is responsible for protection that pertains to law enforcement and related security functions. FPS functions are akin to those of any law enforcement agency. FPS enforces laws, building rules and regulations; investigates and protects against crime; and provides other police-type services.

On the other hand, GSA also is responsible for the protection of GSA-controlled buildings and grounds, excluding the DHS law enforcement and related security functions. GSA's remaining protection functions are akin to those of any property owner to provide for the care and safekeeping of their property and the safety of persons on the property. This may include installing fencing, lighting, and locks on doors, or controlling access into and out of a building. It can also include hiring and deploying contract guards, which are provided by many commercial building owners. However, through GSA's Memorandum of Agreement (MOA) with DHS, effective as of March 1, 2003, GSA and DHS have determined that having DHS provide for security guards is a more effective way of coordinating that protection function with FPS's law enforcement functions because it provides a more seamless approach to the law enforcement response through a single chain of command. Pursuant to the MOA, GSA will continue to make guard contracts available through the Federal Supply Schedule for use by FPS.

Furthermore, GSA is not authorized to bill and collect for FPS's law enforcement services because all of GSA's functions relating to FPS, including GSA's preexisting authority to charge for the law enforcement and related security services provided by FPS, were transferred by sections 403(3) and 1706 of the Act to DHS.

² See Reorganization Plan No. 18 of 1950, 40 U.S.C. § 301 note; 40 U.S.C. §§ 8101, 3101, and 582.

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In summary, GSA is authorized by 40 U.S.C. § 586 to impose charges for space and services (including protection services) furnished by GSA, not protection services (including law enforcement and related security services) furnished by DHS. The provisions of Section 422(b) of the Act, when read in conjunction with 40 U.S.C. § 586, simply preserve the authority of GSA to collect rents and fees (including fees collected for protection services) **provided that the space and services are furnished by GSA.** Section 422(b) does not make GSA responsible for charging for protection services furnished by DHS.

II. DHS Authority to Charge for Protection Services

DHS arguably has authority to bill and collect fees for the protection, law enforcement and related security services provided by DHS through FPS to other Federal agencies under two separate authorities: A. 40 U.S.C. § 586(c) as to protection services other than strictly law enforcement services; and B. the aforementioned Transfer Provisions of the Act as to all DHS protection services including law enforcement.

A. 40 U.S.C. § 586(c). Subject to approval by GSA and the Office of Management and Budget (OMB), 40 U.S.C. § 586(c) provides authority for DHS to impose a charge for certain protection services currently furnished by FPS to agencies occupying GSA-controlled space and to credit the amounts received to the DHS appropriation or fund initially charged for providing the services.

Section 586(c) provides:

(c) Charges by executive agencies.

(1) In general. An executive agency, other than the Administration [GSA], may impose a charge for furnishing space and services at rates approved by the Administrator.

(2) Crediting amounts received. An amount an executive agency receives under this subsection shall be credited to the appropriation or fund initially charged for providing the space or service. However, amounts in excess of actual operating and maintenance costs shall be credited to miscellaneous receipts unless otherwise provided by law.

40 U.S.C. § 586(c) [formerly section 210(k) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 490(k); when re-codified, the Code uses the word "Administration" to refer to the General Services Administration].

The legislative history of 40 U.S.C. § 586(c) states that this section "*would authorize other executive agencies providing building services similar to those furnished by GSA to charge fees therefore as approved by the Administrator of General Services. Receipt from such fees could be credited to the appropriation or fund initially charged, except that amounts in excess of costs incurred would be credited to miscellaneous receipts unless otherwise authorized by law.*" (*emphasis added*). See

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H.R. REP. No. 92-989, at 13 (1972) and H.R. CONF. REP. No. 92-1097, at 12 (1972),
reprinted in 1972 U.S.C.C.A.N. 2370, 2378, 2383.

In addition to GSA approval, OMB must approve the rates charged by DHS.³ Therefore DHS could, with the approval of GSA and OMB, establish a separate billing and collection process for protection services (excluding law enforcement services) provided by DHS.

Prior to the enactment of the Act, GSA was vested with the authority to provide law enforcement services under the former 40 U.S.C. § 318. However, the Act eliminated GSA's authority to perform law enforcement functions and, at the same time, vested DHS with broader law enforcement authority than was previously vested in GSA. See 40 U.S.C. § 1315. Therefore, under current law, it does not appear that GSA could approve rates under 40 U.S.C. § 586(c) for law enforcement services now being provided by FPS, because such law enforcement services are no longer services provided by GSA.

However, section 422 of the Act provides that "[e]xcept for the law enforcement and related security functions transferred [to DHS], the Administrator shall retain all powers, functions, and authorities vested in the Administrator under chapter 10 of title 40, United States Code ..., and other provisions of law that are necessary for the operation, maintenance, and protection of such buildings and grounds [under the jurisdiction, custody, or control of the Administrator]." 6 U.S.C. § 232. Therefore, the rates approved by GSA under 40 U.S.C. § 586(c) clearly may include rates for protection services, other than law enforcement and related security services, provided by FPS. We believe that the costs for providing contract guard services is an example of the type of protection service that DHS could bill and collect from other agencies through this authority.

B. Transfer Provisions of the Act. Alternatively, and in addition to the authority under 40 U.S.C. § 586(c), the Secretary has the authority to bill and collect fees for the law enforcement and related security services provided by its FPS to other Federal agencies because that function (*i.e.*, billing and collecting for FPS-provided services)

³ The provisions currently found in 40 U.S.C. §§ 586 and 592 [formerly 40 U.S.C. §§ 490(j), (k), and (f)] were enacted into law by the Public Buildings Amendments of 1972, Public Law 92-313, 86 Stat. 216. Section 7 of Public Law 92-313 provides: "To carry out the provisions of the Public Buildings Amendments of 1972, the Administrator of General Services shall issue such regulations as he deems necessary. Such regulations shall be coordinated with the Office of Management and Budget, and the rates established by the Administrator of General Services pursuant to sections 210(j) and 210(k) of the Federal Property and Administrative Services Act of 1949, as amended, [now codified as 40 U.S.C. § 586] shall be approved by the Director of the Office of Management and Budget." Reference to the OMB approval requirements of Section 7 of Public Law 92-313 was included in the former 40 U.S.C. § 603 note; however, such a reference is not included in the current Title 40, United States Code, as codified by Public Law 107-217, August 21, 2002, 116 Stat. 1062. Nevertheless, Public Law 107-217 made no substantive changes in existing law; therefore, Section 7 of Public Law 92-313 remains in full force and effect. See Title 40, U.S.C. notes following the Table of Former Title 40 U.S.C..

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was a function that existed in GSA immediately prior to the creation of the DHS, and was a function that was transferred to the Secretary by the Act.

The Act provides in relevant part as follows:

§ 403. Functions transferred

In accordance with title XV (relating to transition provisions), there shall be transferred to the Secretary the functions, personnel, assets, and liabilities of--...
(3) the Federal Protective Service of the General Services Administration, including the functions of the Administrator of General Services relating thereto;...

Section 403 of the Act, 6 U.S.C. § 203 (*emphasis added*).

In addition to directing the transfer of the functions of GSA's FPS, the section specifically provides that the functions of the GSA Administrator that *relate to* the FPS and to FPS's functions, personnel, assets and liabilities are also transferred to DHS. Moreover, section 403 provides that the transfer of these GSA functions shall be in accordance with the Act's transition provisions in title XV (6 U.S.C. § 541, *et seq.*) which provide in pertinent part:

§ 1511. Transitional authorities

(d) Transfer of personnel, assets, obligations, and functions. Upon the transfer of an agency to the Department--

(2) *the Secretary shall have all functions relating to the agency [i.e., the Federal Protective Service] that any other official could by law exercise in relation to the agency immediately before such transfer, and shall have in addition all functions vested in the Secretary by this Act or other law.*

Section 1511(d)(2) of the Act, 6 U.S.C. § 551(d)(2) (*emphasis added*).⁴

Further, the Act defines the term "functions" broadly to clearly cover *any and all responsibilities* that GSA performed on behalf of the FPS before enactment of the Act.⁵ Before the Act, GSA routinely provided standard level security protection (a

⁴ The bracketed text referencing "the Federal Protective Service" was inserted here because it is clear from the context of the provision that the term "agency" is referring to the transferred components of DHS, including the Federal Protective Service. The Act also provides that: "[F]or purposes of this title [i.e., the title on the Transition] that: (1) The term 'agency' includes any entity, organizational unit, program, or function." Pub. L. 107-297, §1501(a), 6 U.S.C. § 541(a) (2004).

⁵ See the Act, at § 101 - Definitions, which provides:

"In this Act, the following definitions apply:

(8) The term 'functions' includes authorities, powers, rights, privileges, immunities, programs, projects, activities, duties, and responsibilities." Pub. L. 107-297, §101(8), 6 U.S.C. § 101 (2004). While some might contend the phrase "functions of the Administrator relating thereto" was intended to only cover the Administrator's statutory authorities that relate specifically to the FPS, like the authority to appoint officers, to issue firearms or to provide law

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FPS function) to other agencies as part of GSA's standard level user charge for GSA furnished space and services.⁶ GSA likewise provided special FPS security services or above-standard security services to other agencies on a reimbursable basis.⁷ Thus, since GSA did perform such billing and collection functions with respect to the FPS before FPS's transfer to DHS, that same function (and the concomitant authority and responsibility) was vested in the Secretary upon the effective date of the Act. While we note that there is no express language in the Act specifically authorizing DHS to bill agencies for these services, we believe that a rational argument can be made to support that proposition based on the express language in the Act transferring all the functions as set forth above.

III. GSA Authority to Provide Billing and Collection Services to DHS

In the alternative to billing agencies directly, because we believe DHS has the authority to bill and collect for FPS services, DHS could seek to enter into an agreement with GSA for GSA to provide the billing and collection services to DHS on a reimbursable basis. Such an agreement is authorized by 40 U.S.C. § 592(b)(2)⁸, 40 U.S.C. § 581(g)⁹, or the Economy Act, 31 U.S.C. § 1535.

GSA could agree to provide the billing and collection services on a reimbursable basis to DHS, using DHS's own authority to bill and collect for services provided by FPS. However, if DHS concludes that it lacks such authority, GSA cannot do for DHS that which DHS lacks authority to do for itself.

enforcement and security services, etc., all of these functions were already transferred to the Secretary immediately upon enactment of section 1706 of the Act or under the first phrase of 403(3), which transferred all of the functions, personnel, assets and liabilities of the FPS. So, the phrase about "the functions of the Administrator relating thereto" must be construed to mean all of GSA's other functions with respect to the FPS. Furthermore, the Act directs that, with respect to any function transferred to the Secretary under the Act, any reference in any Federal law to another department or agency shall be deemed to refer to the Secretary of Homeland Security. See section 1517 of the Act, 6 U.S.C. § 557.

⁶ See GSA's functions under 40 U.S.C. § 581(a) and 40 U.S.C. § 1315, before enactment of the Act; and 40 U.S.C. § 586(b) and § 581(g). See also, 41 CFR Part 102-85; and GSA's PBS Pricing Desk Guide, 2nd ed., section 3.2.6.; and GSA's PBS Customer Guide to Real Property, Chapter 4, Security and Law Enforcement Services.

⁷ *Id.* Also, discussions with PBS's Controller's Office confirms that GSA would routinely provide above standard services (*i.e.*, services above those included in GSA's Rent charge (*i.e.*, base rent and building-specific security charges) to other agencies on a reimbursable basis using GSA's reimbursable work authorizations (RWAs).

⁸ 40 U.S.C. § 592(b)(2) provides: "Reimbursements for special services. -- This subchapter does not preclude the Administrator of General Services from providing special services, not included in the standard level user charge, on a reimbursable basis. The reimbursements may be credited to the Fund.

⁹ 40 U.S.C. § 581 provides that: "The Administrator may -- (1) obtain payments, through advances or otherwise, for services, space, quarters, maintenance, repair, or other facilities furnished, on a reimbursable basis, to a federal agency...; and (2) credit the payments to the applicable appropriation of the Administration."

GAO Legal Analysis of Issues Concerning FPS Activities Not Related to Facility Protection

In its comments on this report, DHS stated that it plans to develop guidance allowing the use of funds for activities unrelated to the protection of buildings and grounds where the activities are *de minimis*. DHS refers to GAO decisions as supporting the use of funds for activities that “are of limited duration with local offices, ad hoc, and do not increase the direct costs of FPS operations and investment in staff.” We do not agree with DHS. We do not believe the GAO decisions DHS cites support the implementation of the *de minimis* concept through guidance sanctioning *de minimis* uses of FPS funds for explicitly prohibited purposes.

Under the Homeland Security Act, only the costs of services provided by FPS personnel that are necessary or incidental to the protection of federal buildings and grounds may be funded out of agency rents and fees. Specifically, section 422(b)(2) of the Homeland Security Act of 2002 states:

“Any amounts transferred by the Administrator of General Services to the Secretary out of rents and fees collected by the Administrator shall be used by the Secretary solely for the protection of buildings or grounds owned or occupied by the Federal Government.”¹

The language in section 422(b)(2) explicitly restricts the use of funds collected by GSA from its tenants out of rents and fees “solely” for the protection of government buildings and grounds. Because of this limitation in the statute, the use of these funds for any purpose other than the protection of government buildings and grounds would not be permitted absent reimbursement pursuant to other applicable statutory authority.

Section 422(b)(2) recognizes that FPS funds come from rents and fees paid by other federal agencies to reimburse FPS for services in protecting their buildings and grounds. To permit DHS to use those funds for purposes unrelated to the protection of federal buildings and grounds in effect would burden those agencies with paying part of the costs of DHS’s mission unrelated to the purpose for which they pay rents and fees. This practice also would result in the unauthorized augmentation of DHS appropriations. We are not questioning the policy judgment of DHS in making FPS personnel available for those activities within DHS’s mission that are not related to the protection of federal buildings and grounds. Rather, we are questioning the use of amounts transferred by GSA to DHS, given the restriction of section 422(b)(2) of the Homeland Security Act, for these activities.

¹Public Law 107-296, 116 Stat. 2135, 2184-2185 (2002).

DHS does not contend that the statute itself permits DHS to expend funds for purposes other than the protection of buildings and grounds and, in fact, DHS recognizes that if funds are used for unrelated purposes they must be reimbursed. However, DHS claims that if the unrelated expenditures are *de minimis* they need not be reimbursed, and DHS proposes to issue guidance to this effect.

DHS relies on two GAO decisions, involving inter- and intra-agency details, as supporting its proposed guidance. In the first decision, 64 Comp. Gen. 370 (1985), we held that, absent specific statutory authority, non-reimbursable details violate the purpose statute, 31 U.S.C. § 1301(a), which provides that appropriations may be spent only on the objects for which they are appropriated. However, we stated there were limited exceptions in which non-reimbursable agency details may still be allowed. Under the first exception, we recognized that non-reimbursable details would be appropriate, and consistent with the purpose statute, where the detail furthers a purpose for which the loaning agency receives appropriations. Under the second exception, which DHS relies upon, we stated that we would not object to details failing to meet the purpose test, as long as the detail is *de minimis* and the fiscal impact on the appropriation is negligible. In this decision, for purposes of defining *de minimis*, we adopted guidance from the Federal Personnel Manual (FPM) relating to agency details, and said we would permit “details for brief periods when necessary services cannot be obtained as a practical matter by other means and the number of persons and cost involved are minimal.” (64 Comp. 370, describing FPM Ch. 300, subchapter 8, Inst. 262, May 7, 1981.) However, in the second decision, 65 Comp. Gen. 635 (1986), we recognized that this discretion had limits. There, we stated that the proposed transfer of 15 to 20 National Labor Relations Board administrative law judges to the Department of Labor “far exceeds the exception for administrative convenience we intended to establish.” We declined to state the dollar amount or number of people participating in a detail that would be considered *de minimis*. In fact, in subsequent cases regarding the detail of employees under the Economy Act,² we reiterated that the reimbursement of the costs of detailed personnel the agency must recover must be based on actual costs.³

²Where no other authority exists, the Economy Act authorizes inter- or intra-agency provision of services on a reimbursable basis based on actual costs. See 31 U.S.C. 1535 and 72 Comp. Gen. 159.

³See, e.g., B-250377, January 28, 1993 and B-257823, January 22, 1998.

As explained below, our opinion in 64 Comp. Gen. 370 does not support DHS's proposal to issue guidance authorizing *de minimis* uses of FPS personnel and resources. The guidance adopted in our decision—the FPM—has been rescinded and is no longer effective.⁴ Moreover, to the extent that our decision is read as setting a *de minimis* standard of general applicability, it is not in keeping with the governing law on this subject.

The concept of *de minimis* comes from the legal maxim *De Minimis Non Curat Lex*—the law does not concern itself with trifles.⁵ This maxim, as applied by courts and by administrative agencies in various contexts, recognizes that a fact or amount may be so insignificant or trifling that it can be overlooked in deciding a legal issue. It places intangible injuries, such as those that are small and difficult to measure, outside the scope of legal relief.⁶ In the context of appropriations law, we have occasionally invoked the *de minimis* concept to analyze the impact on an appropriation of past conduct alleged to be in violation of the law. For example, where agencies have violated anti-lobbying appropriation act restrictions, we have sometimes found the improper expense to be too small, or too commingled with proper expenses, to warrant recovery.⁷ In those cases we used the *de minimis* concept to measure the amount associated with the violation and not to prospectively sanction what would be a violation of law. In a similar vein, the Justice Department's Office of Legal Counsel (OLC) has recognized that some activities may be so minimal, and so

⁴See 60 Fed. Reg. 3055 (Jan. 13, 1995). The only current material on details is found at 5 C.F.R. Part 300, Subpart C which states that agencies may detail employees in accordance with 5 U.S.C. 3341 (allowing details for not more than 120 days).

⁵Black's Law Dictionary 443 (7th ed. 1999).

⁶See 27A Am. Jur. 2d. Equity § 118 and *Swick v. City of Chicago*, 11 F.3d 85 (1993) (In action alleging he was deprived of property without due process of law under the Fourteenth Amendment of the Constitution, police officer was not entitled to recover claimed damages for injury resulting from being placed on involuntary sick leave because any injury was *de minimis*, i.e., intangible, small, difficult to measure.)

⁷In this regard, in several GAO decisions we found violations of anti-lobbying appropriations act restrictions, but determined that the amount expended was nominal and not readily determinable—e.g., the costs of preparing a letter or sending an e-mail—and that the efforts to effect recovery would greatly exceed the amount to be recovered. See B-285298, May 22, 2000; B-178528, July 27, 1978; and B-116331, May 29, 1961.

difficult to segregate from official activities, that the associated expenses do not need to be separately tracked or reimbursed.⁸

To the extent generalities can be drawn from these cases, the *de minimis* concept is most appropriately applied where amounts are not readily determinable and it is clear that it would be difficult or impossible for the agency to allocate the specific costs of an activity, such as the costs of reading and signing a letter. However, the concept must be applied on a case-by-case basis, depending on the unique facts and circumstances involved, not routinely as DHS suggests. See 65 Comp. Gen. 635.

The guidance proposed by DHS would sanction uses of the FPS for purposes unrelated to the protection of federal buildings and grounds, and in our view this is not appropriate. In contrast to the kinds of situations illustrated above, DHS and FPS should be able to identify costs of FPS personnel used for such activities, since those types of costs can be allocated on a daily, hourly, or other periodic basis. For reimbursements under the Economy Act, recovery of actual costs is required.⁹ In fact, those types of costs are commonly allocated when details or the costs of agency personnel providing services to another agency are reimbursed by one agency to another.¹⁰ While agencies may have flexibility in applying the actual cost standard, there must be reasonable assurance that the performing agency is reimbursed for its costs to avoid the ordering or

⁸In 14 U.S. Op. Off. Legal Counsel 144 (1990), OLC dealt with use of facilities of the White House Communications Agency (WHCA) for Presidential travel and communications. The decision observed that appropriated funds can be used for Presidential media contacts only with respect to official, as opposed to political communications, but in a footnote OLC gave an example of a *de minimis* use of WHCA facilities. Specifically, OLC noted that “there will always be particular instances when it will not be evident (and certainly not in advance) whether use of a WHCA facility will be in furtherance of the President’s official, as distinguished from his political responsibilities. For example, a presidential aide who returns a reporter’s telephone call will not know until the conversation is over whether the reporter is interested in political or official matters, or both. We believe that even when it eventuates that the reporter’s inquiry relates more to the President’s political rather than to his official responsibilities, WHCA may pay for such *de minimis* use of its facilities and that special logs need not be maintained nor other monitoring methods employed...” 14 Op. Off. Legal Counsel 144, at note 18.

⁹See 31 U.S.C. 1535 and 72 Comp. Gen. 159 (1993).

¹⁰See B-257823, January 22, 1998. (Direct and indirect costs of personnel allocated by standard hourly rates for each general schedule grade level included salaries, benefits, costs of management and support staff as well as overhead.) See also B-250377, January 28, 1993. (Recovery of actual costs of detailed employees should be readily determinable by pay, personnel and other records that disclose such information.)

performing agency augmenting its appropriations.¹¹ Furthermore, the *de minimis* concept applies on a case-by-case basis. As noted above, the concept of *de minimis* typically goes to measure the amount associated with a violation or damages to be recovered. The concept has not been applied to, nor would the case law support, the prospective approval of activities across an organization like FPS knowing fully that they constitute violations of law.¹² Similarly, any violation of a statute, whether it be characterized as *de minimis* or technical, is not permissible.¹³ For these reasons, we would object to DHS establishing prospective guidance which would sanction use of FPS funds for expenditures that are not incidental or necessary to the protection of federal buildings and grounds.

As discussed above, section 422(b)(2) of the Homeland Security Act of 2002 explicitly directs that funds collected from rents and fees be used “solely” for the protection of buildings and grounds, and the statute recognizes no exceptions to this restriction. In most situations, it can be determined prior to the activity whether it falls within FPS’s mission and is necessary or incidental to the protection of federal buildings and grounds. We recognize that DHS has some flexibility under 422(b)(2) of the Homeland Security Act of 2002 in determining that certain uses of FPS funds may be necessary or incidental to the protection of federal buildings and grounds. For example, if FPS officers were engaged in crowd control at the World Trade protests in Miami incident to their protection of federal buildings during demonstrations, the expenditure of funds for such activities would be allowed as “necessary” or “incidental” to the protection of federal buildings or grounds. However, as we noted in the report, there are other situations where the use of the FPS is not related in any way to the protection of federal buildings and grounds and FPS funds should not be used for such purposes without reimbursement. For example, officers assisting other DHS law enforcement personnel in immigration-related work such as “Operation Predator” or providing security at the Kentucky

¹¹See B-257823, January 22, 1998.

¹²For example, when the Air Force proposed a change to a regulation relating to the shipment of household goods, which would allow an agency disbursing officer to make a known overpayment, the Comptroller General disapproved of the change noting that it would essentially approve in advance violations of the law. 49 Comp. Gen. 359 (1969).

¹³See, e.g., B-253164, August 23, 1993, in which GAO concluded that a seemingly “technical” violation of the Anti-Deficiency Act by the National Labor Relations Board was still a violation of the act and required a report to Congress and the Office of Management and Budget.

Appendix IV
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Derby is not necessary or incidental to the protection of federal buildings and grounds. If the activity does not fall within FPS mission or is not necessary or incidental to the protection of federal buildings and grounds, then the costs of these activities should be identified and reimbursed by the benefiting appropriation.

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